

No. 10279

United States

2 Circuit Court of Appeals

For the Ninth Circuit.

Vrl  
~~2318~~

2319

CUMMER-GRAHAM COMPANY, a corporation,  
Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION,  
a corporation,  
Appellee.

## Transcript of Record

Upon Appeal from the District Court of the United States  
for the District of Idaho  
Southern Division

FILED

NOV 23 1942

PAUL P. O'BRIEN,  
CLERK



No. 10279

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Circuit Court of Appeals  
For the Ninth Circuit.

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Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

GEORGE DONART

Weiser, Idaho

FREDERICK P. CRANSTON

409 Equitable Building

Denver, Colorado,

Attorneys for Appellant.

RICHARDS & HAGA

Boise, Idaho,

Attorneys for Appellee. [2\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States  
for the District of Idaho,  
Southern Division

No. 2152

THE STRAIGHT SIDE BASKET  
CORPORATION, a corporation,

Plaintiff,

vs.

CUMMER-GRAHAM COMPANY, a corporation,  
Defendant.

### COMPLAINT

The Straight Side Basket Corporation, plaintiff in the above entitled action, complains of Cummer-Graham Company, defendant in said action, and for cause of complaint alleges:

#### I.

Jurisdiction is founded on diversity of citizenship and amount. Plaintiff is a corporation organized under the laws of the State of Michigan and citizen and resident of said state, and defendant is a corporation incorporated under the laws of the State of Texas and is a citizen and resident of said state. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3000.00) Dollars.

#### II.

Plaintiff now is and during all the times hereinafter mentioned was the sole owner of patents and

applications for patents covering patented methods, processes, machines and machine attachments for the manufacture of what is commonly known as "Straight Side Broken and/or Bent Bottom Baskets", and other Straight Side Baskets.

### III.

That from time to time for more than ten years last past plaintiff, as the owner of said patent rights, entered into [3] contracts with the defendant and with the Veneer Products Company, a Colorado corporation, which is and was wholly owned, dominated and controlled by the defendant, under and by the terms of which contracts the defendant and its said subsidiary were licensed and authorized to use the said patents and applications for patents covering patented methods, processes, machines and machine attachments, and were furnished with such machines and attachments for the manufacture of such baskets upon the payment to the plaintiff of certain royalties as stipulated and set forth in said contracts. That said contracts further provided that the licensee therein named should furnish reports showing the gross sales of all baskets produced under such license, and that the royalties should be paid on or before the 15th day of each calendar month upon all baskets shipped during the preceding calendar month, and that the licensee should report in writing to plaintiff at the end of each calendar month the amount of gross sales and the number of baskets shipped during said month.

## IV.

That on or about the first day of October, 1941, the defendant reported to plaintiff that the accumulated and unpaid royalties due plaintiff from baskets manufactured, shipped and delivered by the defendant and its said wholly owned subsidiary aggregated Nine Thousand Eighty-seven Dollars and Twenty-six Cents (\$9,087.26). That plaintiff has no information as to the amount of such royalties except the report so made by the defendant. That the defendant has refused and neglected, and still refuses and neglects, to pay the said royalties or any part thereof, all of which said royalties so remaining unpaid have accumulated, as plaintiff is informed and believes and so alleges the facts to be, since the first day of January, 1941. [4]

## V.

That there is now due and owing from the defendant to the plaintiff the said sum of Nine Thousand Eighty-seven Dollars and Twenty-six Cents (\$9087.26), with interest thereon at the rate of six per cent (6%) per annum from the date the various items comprising said sum should have been paid according to the terms of said agreements.

Wherefore, Plaintiff demands judgment against the said defendant for the said sum of Nine Thousand Eighty-seven Dollars and Twenty-six Cents (\$9087.26), with interest at the rate of six per cent

(6%) per annum as aforesaid, and for his costs herein.

RICHARDS & HAGA

Attorneys for Plaintiff

Residence: Boise, Idaho

OLIVER O. HAGA

Of Counsel for Plaintiff

(Duly verified)

[Endorsed]: Filed Oct. 21, 1941. [5]

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[Title of Court and Cause.]

SUMMONS

To the above named Defendant: Cummer-Graham Company, a corporation

You are hereby summoned and required to serve upon Richards & Haga and Oliver O. Haga, plaintiff's attorneys, whose address is Boise, Idaho, Idaho Building, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

W. D. McREYNOLDS

Clerk of Court.

Date: October 21st, 1941.

## RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 30th. day of October 1941, I received the within summons and served same on the within named defendant, C. H. Kinney on October 30th, 1941 at Payette Idaho by showing him the original Summons and handing to him personally two copies of same. C. H. Kinney served as sales manager of defendant corporation, Cummer-Graham Co.

ED. M. BRYAN

United States Marshal.

By EARLE B. WILLIAMS

Deputy United States  
Marshal.

Marshal's Fees

Travel -----\$4.64

Service ----- 2.00

6.64

[Endorsed]: Filed Nov. 5, 1941. [6]

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[Title of Court and Cause.]

MOTION TO DISMISS

The defendant moves the Court as follows:

I.

To dismiss the action on the ground that it is in the wrong district because the jurisdiction of this Court is invoked solely on the ground of diversity of citizenship, and it appears upon the face of the complaint that plaintiff is a corporation organized



under the laws of Michigan, and is a citizen and resident of said State; and it appears upon the face of the complaint that defendant is a corporation organized under the laws of Texas and is a citizen and resident of said State; and this action has not been brought in the district of the residence of either the plaintiff or defendant as required by U. S. Code, Title 28, Sec. 112, and the venue of this action has been improperly laid;

## II.

To dismiss the action, or in lieu thereof to quash the service of summons, or quash the return of service of summons on the ground that the defendant is a corporation organized under the laws of Texas, and was not and is not subject to [7] service of process within the District of Idaho, and has not qualified to do business in Idaho, and at the time of service of summons was not engaged in doing business in Idaho, and is not now so engaged, and the defendant has not been properly served with process in this action; all of which more clearly appears in the affidavit of C. H. Kinney, hereto annexed as Exhibit A.

GEO. DONART

Residing at Weiser, Idaho.

FREDERICK P. CRANSTON

409 Equitable Building

Denver, Colorado

Attorneys for Defendant.

Defendant's Address: Paris, Texas

(Service Accepted)

[Endorsed]: Filed Nov. 17, 1941. [8]

EXHIBIT A (Attached to Motion To Dismiss)

[Title of Court and Cause.]

AFFIDAVIT OF C. H. KINNEY

State of Idaho

County of Payette—ss.

C. H. Kinney, being first duly sworn, deposes and says:

That he is the same identical C. H. Kinney upon whom the summons issued in the above entitled cause was served by the United States Marshal or Deputy United States Marshal by and under direction of the plaintiff;

That said summons was delivered to him at Payette, Idaho, on or about the 30th day of October, 1941;

That he is a resident and citizen of Paris, Texas; that he is not a cashier, secretary or managing or general agent of the defendant corporation and he is not an agent authorized by appointment or by law to receive service of process for and in behalf of said corporation, and that he has not been designated by the defendant corporation pursuant to the terms of any statute of the State of Idaho as an agent of said corporation upon whom service of process issued out of any Court may be made; [9]

That he is Western Sales Manager of the defendant corporation and represents said corporation with respect to sales of its materials in the State of Idaho and other western and southwestern states;

That he works under the direction of the officers

of said corporation and has no voice in the management or control of the affairs of said corporation;

That Cummer-Graham Company is a Texas corporation, and has not qualified to do business in the State of Idaho, and was not at the time the purported service of process upon him, nor at any other time engaged in business in Idaho, nor is it now engaged in business in Idaho; that it then maintained no office or place of business in the State of Idaho, nor does it now maintain, nor has it at any time maintained such office or place of business in Idaho; that all sales made by it to customers in the State of Idaho have been filled by shipment to said customers from points outside the State of Idaho, to-wit, in the State of Texas.

C. H. KINNEY

Subscribed and sworn to before me this 15th day of November, 1941.

[Seal]                      GEO. DONART

Notary Public, Residing at Weiser, Idaho.

My commission expires: 3-18-44. [10]

[Title of Court and Cause.]

AFFIDAVIT IN OPPOSITION  
TO MOTION TO DISMISS

State of Idaho

County of Ada—ss.

Oliver O. Haga, being first duly sworn, upon his oath deposes and says:

I.

That he now is and for many years last past has been an attorney for the plaintiff, The Straight Side Basket Corporation, and is engaged in the practice of law in the State of Idaho, and has his office in Boise, Idaho, and is a member of the firm of Richards & Haga; that he makes this affidavit for and on behalf of the above named plaintiff for the reason that plaintiff is a corporation incorporated under the laws of the State of Michigan and has its office and principal place of business at Benton Harbor, Michigan, and its officers reside in the State of Michigan, and none of its officers is now within the State of Idaho.

II.

That affiant has made diligent search and inquiry as to the extent and nature of defendant's business in the State of Idaho and the extent to which C. H. Kinney, on whom summons was served in this cause, represents and acts for said defendant in the State of Idaho and elsewhere; that based upon the information so obtained and which affiant verily believes

to be correct, this affiant [11] alleges the facts to be:

(a) That said C. H. Kinney now is and for many years last past has been the western sales-manager of the said defendant and as such sales-manager he has represented the defendant in all business transacted by said defendant in the State of Idaho, as hereinafter more particularly set forth; that said C. H. Kinney has his permanent residence in the City of Paris, State of Texas, which is the home office and headquarters of said defendant; that said defendant is the owner of a subsidiary corporation known as the Veneer Products Company, a Colorado corporation, also engaged in manufacturing baskets for the packing of fruit and vegetables, and said C. H. Kinney, acting for the defendant herein, is president of said Veneer Products Company, and as such transacts business for the defendant by selling in the name of said Veneer Products Company baskets manufactured by said corporation.

(b) That for many years last past the said defendant and the said Veneer Products Company have manufactured baskets under patents owned by plaintiff and under contracts with plaintiff, by the terms of which the said defendant and the said Veneer Products Company agreed to pay to plaintiff a certain amount for each and every basket manufactured; that a large amount of such baskets have been manufactured by the defendant, and to some extent also by said Veneer Products Company, and the baskets so manufactured by the defendant

under the patents owned by plaintiff, and on which the defendant has agreed to pay plaintiff a certain amount for each basket so manufactured, have been sold in the State of Idaho by or with the aid and assistance of said C. H. Kinney, as hereinafter set forth; that the amount of baskets so sold in the State of Idaho by said defendant, by or with the aid and assistance of said C. H. Kinney, have amounted to from \$75,000.00 to \$125,000.00, and upwards, per year for many years last past. [12]

(c) That the usual course of handling defendant's business in Idaho has been to have two distributors in southwestern Idaho through whom such baskets could be purchased by the growers and other dealers, but in order to promote the sale of baskets so manufactured by the defendant, said C. H. Kinney, as salesmanager, has for many years last past spent much of his time in the State of Idaho during the packing season or during the period when baskets are usually sold to or contracted for by the growers and dealers, and during such period has devoted himself to the selling of defendant's baskets and aiding and assisting defendant's distributors in selling or promoting the sale of such baskets; that the defendant shipped said baskets usually in car-load lots and it has been customary for defendant to consign such baskets to itself, and from the shipments so received in the State of Idaho, baskets have been delivered in the state to dealers and growers; again, defendant ships baskets to its distributors in the state, and if, at the

close of the packing season, there is any substantial amount of baskets unsold, they are stored in the State of Idaho by and for the account of the defendant and held at its cost and expense until the next packing season, when the baskets so stored and carried over from the preceding year are sold to growers or dealers or to defendant's distributors; that a substantial part of defendant's business as handled in the State of Idaho is not inter-state business, but is based on sales made in the State of Idaho, solicited or made by said C. H. Kinney in whole or in part, or with the aid of the distributors, and deliveries of baskets are made from stocks of the defendant in the State of Idaho.

(d) That said C. H. Kinney has, to all intents and purposes, full authority as to sales made in the State of Idaho, and as heretofore stated, he represents and has represented said defendant for many years last past in carrying on the sale of its baskets, not only in the State of Idaho but in other western states. [13]

### III.

That the defendant has acquired a substantial amount of orchard property and other property in the State of Idaho in satisfaction of debts due it from dealers, distributors and growers, and while defendant is the owner thereof, the title thereto is held in the name or names of other parties because the defendant has failed to qualify as a foreign corporation under the laws of the State of Idaho, and by reason thereof cannot legally hold title to such property; that said C. H. Kinney manages and

supervises the handling of the orchard property so acquired and the caring for the orchards and the marketing of fruit from such orchards, and represents the defendant in such matters, and is the only representative or officer of the defendant who handles, manages or cares for defendant's property in the State of Idaho.

#### IV.

That the defendant does no business in the State of Michigan and has no property in said state on which plaintiff can levy execution or a writ of attachment or from which it can recover the amount due plaintiff from the defendant.

OLIVER O. HAGA

Subscribed and sworn to before me this 22nd day of January, 1942.

[Seal] CHAS. H. DARLING

Notary Public for Idaho

Residence: Boise, Idaho

(Affidavit of Service Attached)

[Endorsed]: Filed Jan. 27, 1942. [14]

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[Title of Court and Cause.]

### COUNTER-AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

State of Colorado

City and County of Denver—ss.

C. H. Kinney, being first duly sworn, deposes and says that the word "defendant" as used herein re-



fers to Cummer-Graham Company; that he now is and since 1938 has been Salesmanager for defendant, but he has not represented defendant in all business transacted by defendant in Idaho; that he is not, and has not been western salesmanager of defendant; that prior to November 1938 and after December 1934 he was Western Manager of Basket Sales Company, a Texas corporation.

That defendant has been represented in its business transactions in Idaho at various times by Arthur V. Kinney, Wallace Norton, J. C. DeShonge and J. A. McGill.

That affiant has not transacted business for defendant by selling in the name of the Veneer Products Company any baskets whatsoever.

That Veneer Products Company has not manufactured any baskets since 1934 except for defendant, Cummer-Graham Company, and has sold all baskets manufactured by it to Cummer-Graham Company in the State of Texas, and has made no sales and transacted no business in Idaho since 1934.

That the usual course of handling defendant's business in Idaho has been to make sales at wholesale to distributors in [15] Idaho through whom such distributors have made sales at retail to growers and other dealers.

That affiant has, since 1938, spent a maximum of two months per year in Idaho, and some years has spent less; that as Salesmanager, his territory covers twenty-six states of which Idaho is only one; that all of said sales to defendant's customers have

been shipped in carload lots from outside of Idaho; and when requested by the distributors to whom sales have been made, some baskets have been delivered in Idaho directly to the customers of said wholesale distributors, but the said sales have been made, and the accounts charged to said distributors and not to the customers of said distributors to whom deliveries have been made; and said distributors in making sales to their customers have at all times acted entirely in their own behalf, and not in behalf of or under the direction of defendant; that if at the close of the packing season any substantial amount of baskets have been unsold by defendant's distributors, they have been stored in Idaho by said distributors at the expense of the said distributors, and not by nor at the cost and expense of the defendant; that defendant has permitted payment of the accounts of said distributors represented by the unsold baskets to be postponed until the said distributors shall have disposed of said baskets through their own efforts, but that said baskets so stored or carried over have been at all times held and carried over by and at the cost of the wholesale distributor, and not by or at the cost of defendant, and all credit risks are assumed by the wholesale distributors; and taxes and insurance have been paid thereon by said wholesale distributors, and in the name of said wholesale distributors, and in some instances with loss payable clause to defendant as its interest may appear, and not by or in the name of defendant, all of which

has been done under the terms of consignment contracts with said wholesale distributors; that all of defendant's business handled in Idaho has been and is interstate business, and none of it has [16] been or is handled solely and entirely in the State of Idaho; and no baskets have at any time been delivered by defendant from stocks belonging to defendant in Idaho.

That affiant does not have nor does he hold himself out to have full authority for sales made in Idaho; that the policies, prices and terms are determined by the Board of Directors of defendant, which has never held any meeting in Idaho, and under whose instructions he acts at all times, and to which he refers any questions of policy departing from instructions theretofore given to him by said Board.

That except for indebtedness due to it, the defendant has not acquired and does not own a substantial or any amount of orchard property, or of any property, in Idaho, and has not acquired any such property in satisfaction of a debt or debts due it from dealers, distributors or growers, or from any other person, or for any other reason, nor does defendant own or cause the title thereof to be owned or held in the name or names of other parties for its benefit; that affiant does not and has not managed or supervised any orchard property in Idaho, nor has he managed or supervised the handling or the caring for the same, nor the marketing of fruit therefrom, nor does he, nor has he rep-

resented defendant in such matters, nor does defendant have any representative or officer who handles or manages or cares for any property in Idaho other than to make sales in interstate commerce as by affiant's affidavits herein admitted.

That defendant has ample property free and clear of all encumbrances in the State of Texas from which plaintiff may satisfy any judgment which it may obtain against defendant.

C. H. KINNEY

Subscribed and sworn to before me this 29th day of January, 1942. My commission expires December 16, 1942.

[Seal]

MARGARET T. RICH

Notary Public

[Endorsed]: Filed Feb. 2, 1942. [17]

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[Title of Court and Cause.]

MINUTES OF THE COURT OF  
FEBRUARY 2, 1942

This cause came on for hearing on the defendant's motion to dismiss the complaint. O. O. Haga, Esquire, appeared for the plaintiff and George Donart, Esquire, appeared for the defendant.

It was agreed by counsel that the plaintiff would amend the complaint to include the matters set forth in the affidavit of O. O. Haga and that thereupon the defendant would withdraw the affidavit of C. H.

Kinney filed on this date, all of which was approved by the Court, and it was so ordered.

Submission of the defendant's motion to dismiss the complaint as so amended was continued until after the deposition of the motion to quash service of summons. The Court granted the parties thirty days in which to prepare for the submission of said motion to quash by either affidavits or by depositions. [18]

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[Title of Court and Cause.]

ORDER

On motion of attorneys for plaintiff, supported by affidavit of Oliver O. Haga, and good cause appearing therefor;

It Is Ordered That both parties to this cause may have to and including the 19th day of March in which to take depositions for use on the hearing of defendant's Motion to Quash the Service of Summons and Dismiss Plaintiff's Complaint.

Dated this 14th day of February, 1942.

CHARLES C. CAVANAH

District Judge

[Endorsed]: Filed Feb. 14, 1942. [19]

[Title of Court and Cause.]

### AMENDED COMPLAINT

By leave of court first had and obtained, The Straight Side Basket Corporation, plaintiff in the above entitled action, files this, its amended complaint, against the defendant, Cummer-Graham Company, and alleges:

#### I.

That plaintiff is a corporation organized under the laws of the State of Michigan and a citizen and resident of said state, and defendant is a corporation incorporated under the laws of the State of Texas and is a citizen and resident of said state but doing business in the State of Idaho, as hereinafter more particularly set forth; that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

#### II.

That plaintiff now is and during all the times hereinafter mentioned was the sole owner of certain patents and applications for patents covering patented methods, processes, machines and machine attachments for the manufacture of stave baskets for use in packing and marketing fruits and vegetables, including but not limited to a type of basket commonly known as the straight side, broken, and/or bent-bottom baskets and the S.I.B. (Stitched-in-Bottom) or ideal hamper baskets. [20]

## III.

That from time to time for more than ten years last past, plaintiff, as the owner of said patent rights, entered into contracts with the defendant and with the Veneer Products Company, a Colorado corporation, which is owned by the defendant, Cummer-Graham Company, or by the principal stockholders thereof, and is wholly dominated and controlled by the defendant, Cummer-Graham Company, under and by the terms of which contract the defendant and its said subsidiary or affiliate, Veneer Products Company, were licensed and authorized to use the said patents and applications for patents covering patented methods, processes, machines and machine attachments, and the said defendant and its said subsidiary or affiliate corporation were furnished with such machines and attachments for the manufacture of such baskets under agreements providing for the payment to plaintiff of certain royalties stipulated and set forth in said contracts and computed upon and to be paid according to the number of baskets manufactured and sold by said defendant; that said contracts further provide that the licensee therein named should furnish reports showing the gross sales of all baskets produced under such licenses, and that the royalties to be paid under said contracts should be paid on or before the 15th day of each calendar month upon all baskets manufactured and shipped during the preceding calendar month, and that the licensee should report in writing to plaintiff at the end of

each calendar month the amount of gross sales and the number of baskets shipped during said month.

#### IV.

That on or about the 15th day of July, 1942, the defendant reported to plaintiff that the accumulated and unpaid royalties due plaintiff from baskets manufactured, shipped and sold by the defendant and its said subsidiary or affiliate corporation aggregated as of June 30, 1942, \$16,437.48, no part of which has been paid by said defendant or by said Veneer Products Company, but said [21] defendant admitted in its said report that said sum was the unpaid balance of the royalties payable under the licenses covered by the contracts between plaintiff and the defendant and said Veneer Products Company, and also admitted by said defendant as the amount of its liability to plaintiff under said contracts and licenses; that plaintiff has no information as to the amount of such royalties except the report so made by the defendant; that defendant has refused and neglected, and still refuses and neglects, to pay the said royalties or any part thereof.

#### V.

That the baskets manufactured by said Veneer Products Company are so manufactured under the domination and control as aforesaid of the said defendant, and are sold by the defendant under some contract or agreement between the plaintiff and said Veneer Products Company, and said defendant purports to include in its monthly reports to



this plaintiff the baskets manufactured by both the defendant and said Veneer Products Company, but for the reasons hereinbefore alleged plaintiff has no information as to the correctness of said reports except the statements made by the defendant. [22]

## VI.

That plaintiff is informed and believes, and so alleges the fact to be, that the defendant does no business and sells no baskets in the State of Michigan and has no property or assets in said state; that more baskets manufactured by the defendant and its said subsidiary or affiliate corporation under the licenses granted by the plaintiff to said corporations are sold in the State of Idaho than in any other state; that defendant sells upwards of 200 carloads of such baskets in the State of Idaho during the fruit packing season of each year, and in order to develop and maintain the market for such baskets in the State of Idaho the defendant has several agents or distributors in said state, and it ships its baskets, generally, in carload lots into said state for present and future use in filling its orders, and sales made in the State of Idaho are repeatedly made from supplies owned by defendant in said state either from carload shipments consigned to the defendant in the State of Idaho or from stocks warehoused by or for defendant in the state; that executive officers and sales managers of the defendant spend upwards of 60 days each year in the State of Idaho during the fruit packing and shipping season, promoting sales of baskets and calling upon dealers and growers who are prospective

buyers of baskets, in an endeavor to sell baskets so manufactured by defendant and its said affiliate corporation under the licenses covered by their contracts with plaintiff; that C. H. Kinney, General Sales Manager of defendant, at the time of the service on him of the Summons in this action was in the State of Idaho on defendant's business and promoting the sales of its baskets and otherwise carrying on defendant's business in the State of Idaho; that said defendant at the time of the commencement of this action was and for several years prior thereto had been continuously doing intra-state business in said state, and said C. H. Kinney then was and for a long time [23] prior thereto had been president of said Veneer Products Company and General Sales Manager, as aforesaid, of the defendant, not only in the State of Idaho but in upwards of 25 other states, and the main or principal office of said C. H. Kinney was at the office of the defendant in Paris, Texas.

Wherefore, Plaintiff prays: That plaintiff may have judgment against the defendant for the sum of \$16,437.48 with interest as provided by law.

3. That plaintiff may have such other and further relief as may be just and proper under the circumstances, and for its costs herein.

RICHARDS & HAGA

Attorneys for Plaintiff.

Residence: Boise, Idaho.

OLIVER O. HAGA

Of Counsel for Plaintiff.

[Endorsed]: Filed April 6, 1942. [24]

[Title of Court and Cause.]

AFFIDAVIT OF OLIVER O. HAGA

State of Idaho,  
County of Ada—ss.

Oliver O. Haga, being first duly sworn, upon his oath deposes and says:

That on or about the 14th day of February, 1941, C. N. Kinney of Denver, Colorado, father of C. H. Kinney, General Sales Manager of the above named defendant, was named as grantee in a certain deed from F. H. Hogue and Florence G. Hogue of Payette, Idaho, which deed conveyed to said C. N. Kinney upwards of nine separate properties in Payette County, Idaho, situated principally in Payette, New Plymouth and Fruitland, and included approximately 30 acres of orchards, warehouses, packing houses and other real estate; that said property was conveyed to said C. N. Kinney in trust for certain creditors of said F. H. Hogue, including, as affiant is informed and believes and so alleges the fact to be, the defendant, Cummer-Graham Company;

That although the defendant, Cummer-Graham Company, claims to have no interest in said property or trust, the president of said company, one J. A. McGill, is named in the trust agreement as one of the principal creditors of said F. H. Hogue, [25] but it appears from the official reports made by said C. N. Kinney to the creditors of said F. H. Hogue that said defendant, Cummer-Graham Com-

pany, advanced to said C. N. Kinney for use in maintaining and caring for and managing said trust property \$7,000.00 during the year 1941, which was substantially all the moneys advanced to said C. N. Kinney for use in connection with said property during said period.

OLIVER O. HAGA

Subscribed and sworn to, before me, this 6th day of April, 1942.

[Seal]

J. L. EBERLE

Notary Public for Idaho

Residence: Boise, Idaho.

[Endorsed]: Filed April 6, 1942. [26]

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[Title of Court and Cause.]

OPINION

Richards & Haga,

Boise, Idaho,

Attorneys for the Plaintiff

George Donart,

Weiser, Idaho

Frederick P. Cranston,

Denver, Colorado

Attorneys for the Defendant.

April 15, 1942.

Cavanah, District Judge.

The defendant presents his motion to dismiss in which it urges the quashing of the service of summons on the ground that the action is brought in

the wrong district, as the jurisdiction of the Court is involved on the ground of diversity of citizenship as it appears that the plaintiff is a Michigan corporation and the defendant is a Texas corporation who is not qualified to do or engage in business in the State of Idaho.

The motion is based on the complaint, affidavits and depositions.

The question requires the consideration and application of paragraph (a) of Section 112 Title 28 U. S. C. A. under the facts presented, as it is there provided: "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is apparent that the present suit is based on diversity of citizenship and is not brought in the district of the residence of either plaintiff or defendant or that the defendant, [27] a foreign corporation, has designated in conformity with the State law, an agent upon whom service of process may be made, but is upon the contention of the plaintiff that the defendant has waived this requirement of the statute and consented to be sued in the federal court by reason of the parties bringing about a state of facts which has authorized the federal court to take cognizance of the case.

If the facts presented create such a situation then it is urged that the case is governed by the late principle announced by the Supreme Court in the case of *Neibro et al., v. Bethlehem Shipbuilding Corporation Ltd.*, 308 U. S. 165, where service was made upon a designated agent in conformity with state statute, and where the Court said: "jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit,—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. \* \* \* Being a privilege, it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." This interpretation and application of the statute as respects jurisdiction of the federal courts over a corporation where the question of diversity of citizenship was involved, has announced a broader construction of Section 112 Title 28.

What then is the situation here which we are required to consider under the *Neibro* case? Does the conduct of the defendant corporation constitute a waiver of the federal statute? Has it consented by reason of its conduct to be sued in the federal court?

The defendant did not designate a person upon whom summons may be served within the State and service was made upon C. H. Kenny a sales man-

ager of the defendant when he was within the State. Did the conduct of the defendant and its sales manager establish that it was doing business within the State to an extent that will authorize service of process on an agent or officer of the corporation in [28] determining the presence of a corporation within the State so that service may be made? It seems to be the rule that a person upon whom service was made must be an agent or representative of the defendant authorized to represent it and did so in transacting business of the corporation within the State, and that service of summons was made upon him within the State. The power to receive service of process by the agent or one authorized to represent a corporation can fairly be implied from the kind and character of agent employed. *Rendleman v. Niagara Sprayer Co.*, 16 Fed. (2) 122.

The facts alleged in the complaint and disclosed by the affidavits and depositions indicate the presence of the defendant in the State of Idaho, as its, and its general sales manager's course of conduct were of such a nature and extent enabling the Court to say that the defendant is carrying on business in such sense as to manifest its presence within the State. Its acts of business in the State were sufficient to show an intent on its part to carry out and make it an effective part of the its field of operation and its business. Mr. C. H. Kenny's, upon whom service of summons was made, activities and jurisdiction covered twenty-six states. He was

authorized to conduct the sales of baskets which was the principal business of the defendants, and holds positions with the defendant's affiliated companies. He travels in twenty-six states, supervising sales with wholesalers, and assists in sales work, looking after collection, taking orders and doing anything that comes up in the handling and selling of merchandise. The defendant does an extensive business within the State of Idaho, and C. H. Kenny supervises all sales there, and he stated as to his duties: "Oh, my, there are so many things pertaining to sales work, keeping customers sold on your product, specialty work helping your dealers increase their sales, looking after collections, seeing that your money comes in,—everything connected with sales work, I would say." He helped the defendant's dealers or jobbers in Idaho to do anything that would help promote sales, and spent upwards of sixty days a year in Idaho as sales manager and promoting defendant's business in diverting cars, making collections and sales. [29]

Defendant had consignment agreements with distributors or jobbers for carry-over baskets, and operated at times on a commission basis with others. When such agreements were made on consignment, baskets were shipped on order and sold on commission and if not sold the baskets would have to be returned, or the money.

Notice of garnishment was served in Idaho upon those having a large number of baskets belonging to the defendant. The evidence indicates that when



the baskets were shipped on commission agreements and the price of baskets carried over for the next year, the distributors or jobbers would have to inquire of the defendant what he was to sell them for, thereby creating a selling agreement operating system on a commission basis, and the price was subject to regulation by the defendant as owner of the baskets. In other words the defendant had brought its property into the State and retaining title thereto until it was sold in some instances at such price it could fix after being in the State. Some of the testimony showed that the defendant had sold direct to growers in Idaho. It seems that C. H. Kenny had negotiated contracts in Idaho with dealers, directed cars to customers and advised them that he had done so. It is therefore, from these and other facts in the record evident that C. H. Kenny at the time of the service of the summons upon him held a responsible and important position and as a representative of the defendant.

The laws of Idaho authorizing service of summons upon a foreign corporation doing business in the State without having designated a person upon whom process may be served authorizes the service of summons upon the County Auditor, section 5-607 I. C. A.

This provision of the State statute has been construed by the Supreme Court of the State in the case of *Boise Flying Service v. General Motors Acceptance Corporation* 55 Idaho 5; 36 Pac. (2) 813 and a foreign corporation would be subject to suit

in the State courts. The rule laid down in that case, when applied to the facts here, the defendant is doing business in the State.

It is clear that all acts and things the defendant did combined, constituted doing business. [30]

Under facts similar to those disclosed by the affidavits and depositions here the Courts have held such activities by foreign corporations as doing business within the State and is subject to the service of summons giving federal courts jurisdiction. *Harbich et al v. Hamilton Brown Shoe Co. et al.*, 1 Fed. Supp. 63; *Clements v. MacFadden Publications Inc., et al.*, 28 Fed. Supp. 274; *Beach v. Kerr Turbine Co.*, 243 Fed. 706; *Michigan Aluminum Foundry Co., v. Aluminum Castings Co., et al.*, 190 Fed. 879; *Toledo Computing Scales Co., v. Computing Scales Co.*, 142 Fed. 919.

Each case must stand on its peculiar facts and jurisdiction may be asserted when the facts show that inferences may be fairly drawn that the corporation is present in the State. Such inference may be drawn as well as the direct facts that the defendant is present and doing business in the State.

The motion to quash the service of summons is overruled.

[Endorsed]: Filed April 15, 1942. [31]

[Title of Court and Cause.]

ORDER

In harmony with memorandum opinion filed this date, it is Ordered that the defendant's motion to quash the service of summons be and the same is overruled.

Dated April 15, 1942.

CHARLES C. CAVANAH

United States District Judge.

[Endorsed]: Filed April 15, 1942. [32]

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[Title of Court and Cause.]

MINUTES OF THE COURT OF  
MAY 7, 1942

Further hearing on the defendant's motion to dismiss having been set for this time and no appearance being made by counsel for oral argument,

The Court ordered that said motion be and the same hereby is denied. [33]

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[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Filed May 16, 1942

Comes now the defendant and without answering to the merits but expressly re-asserting that this Court does not have jurisdiction over the defendant

for the reasons set forth in defendant's Motion to Dismiss, and for the reasons set forth herein, answers as follows:

1. Defendant denies that at any time it has done or that it now is doing business in the State of Idaho as set forth in the Complaint or in any other manner.

2. Defendant alleges that it has at no time been and is not now engaged in doing business in the State of Idaho, and has not and is not qualified to do business in the State of Idaho.

3. Defendant alleges that this action has not been brought in the district of the residence of either the plaintiff or the defendant and that the venue of this action has been improperly laid.

4. Defendant alleges that it is not subject to service of process within the District of Idaho, and has not been properly served with process in this action.

5. Defendant alleges that all sales and shipments of baskets made in or into the State of Idaho were made as part of interstate commerce transactions. Defendant denies that it at [34] any time has had or that it now has any stocks warehoused by or for it in the State of Idaho.

6. Defendant denies that it has or has at any time had agents or distributors in Idaho. It admits that it has and has had customers in Idaho, but it denies that said customers are or have at any time been its agents or distributors, but on the contrary, it alleges that said terms have been loosely used to describe customers. It alleges that the trans-

actions with such persons have been limited to purchases and sales, and such persons have purchased defendant's merchandise, but have not acted and have had no authority to act as defendant's agents or representatives.

7. Defendant admits that as a part of interstate commerce transactions it has shipped its baskets into the State of Idaho and before such interstate shipments had ceased and while the baskets were in the original freight car or cars which had originated outside of the State of Idaho, and before said original shipments had been broken and before any delivery thereof had been made, defendant filled orders by diverting said cars to its customers in order to fill orders for sales of said merchandise. It alleges that in none of such cases was it contemplated when such shipment originated from points outside of the State of Idaho that delivery would be made to defendant in the State of Idaho, and in none of such cases was delivery so made. Except as above admitted, defendant denies that it ships or has shipped its baskets in or into the State of Idaho for present or future use in filling its orders and except as above admitted, it denies that sales made in the State of Idaho are or have been made from supplies owned by defendant in the State of Idaho or from shipments consigned to defendant in the State of Idaho or from stocks warehoused by or for defendant in the State of Idaho.

8. Defendant admits that its executive officers

upon infrequent occasions, and for short periods of time, and its sales [35] manager for periods not exceeding a total of sixty days in any one year have been in the State of Idaho. Except as above admitted, defendant denies that its executive officers or sales manager have spent any periods of time in the State of Idaho. Defendant alleges that C. H. Kinney was not and that at no time has been an officer or director, or general agent, or local agent, or an agent in any manner authorized to receive or accept service of process of or for defendant.

9. Defendant denies that at the time of the commencement of this action or at any other time defendant was or that it now is continuously or otherwise doing any intra-state business in the State of Idaho.

10. Defendant refuses to answer any allegations of the Amended Complaint concerning the merits of the action, and declines in any manner to plead to the merits.

Wherefore, Defendant prays that this action be dismissed.

GEORGE DONART

of Weiser, Idaho.

FREDERICK P. CRANSTON

of 409 Equitable Bldg.,

Denver, Colorado.

Attorneys for Defendant.

Defendant's Address:

Paris, Texas.

[Endorsed]: Filed May 16, 1942. [36]

[Title of Court and Cause.]

MOTION FOR SUMMARY JUDGMENT  
UNDER RULE 56

Comes now the above named Plaintiff, Straight Side Basket Corporation, a corporation, and moves the Court for a Summary Judgment herein under Rule 56 of the Federal Rules of Civil Procedure, because Defendant's Answer to plaintiff's Amended Complaint presents only questions of law which were heretofore argued, briefed and submitted to the Court for decision under defendant's Motions to Dismiss and which questions were heretofore decided in favor of plaintiff and against defendant; that the pleadings and decisions on file herein show there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, for an accounting as prayed in the Amended Complaint, and for judgment for the amount that will be found due upon such accounting, and for such other and further relief as the Court may deem just, with costs.

May 23, 1942.

RICHARDS & HAGA

Attorneys for Plaintiff.

Residence: Boise, Idaho.

[Endorsed]: Filed May 25, 1942. [37]

[Title of Court and Cause.]

NOTICE OF AMENDMENT TO  
AMENDED COMPLAINT

To The Above Named Defendant and to Messrs.  
George Donart and Frederick P. Cranston,  
Attorneys of Record for said Defendant:

You And Each Of You Will Please Take Notice that at the time of the hearing on Plaintiff's motion on August 11, 1942, for summary judgment, plaintiff will request leave to amend its Amended Complaint herein as follows:

By striking out in the first line of paragraph IV of its Amended Complaint the word "March" and substituting "July" and in the fifth line of said paragraph the words and figures "February 28" and substituting "June 30", and by striking out the figures "\$11,894.07" and substituting "\$16,437.48"; also by striking out all requests for an accounting, both in the body of said Amended Complaint and in the prayer thereof, and by striking out the figures "\$11,894.07" in paragraph 2 of the prayer and substituting the figures "\$16,437.48", and by striking out "February 28" and substituting "June 30" in said paragraph.

The effect of said amendments will be to request the court to enter judgment against defendant for



the sum of \$16,437.48 as the amount due plaintiff at the end of June, 1942.

Dated this 1st day of August, 1942.

RICHARDS & HAGA

Attorneys for Plaintiff

(Affidavit of Service Attached)

[Endorsed]: Filed August 10, 1942. [38]

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[Title of Court and Cause.]

#### AMENDMENTS TO AMENDED COMPLAINT

Comes now the plaintiff, The Straight Side Basket Corporation, and pursuant to notice given the defendant herein on the 1st day of August, 1942, and by leave of Court first had and obtained, and amends its Amended Complaint herein by interlineation as follows:

1. In paragraph IV strike out the word "March" from the first line of said paragraph and substitute the word "July" and in the fifth line of said paragraph strike out the words and figures "February 28, 1942, \$11,894.07" and substitute therefor "June 30, 1942, \$16,437.48".

2. In line eleven from the bottom of paragraph IV insert a period after the word "thereof" in lieu of the comma and strike out the balance of said paragraph, which reads as follows:

"all of which said royalties so remaining unpaid have accumulated, as plaintiff is informed and believes and so alleges the facts

to be, for upwards of two or more years; that it is impossible for plaintiff to ascertain the amount actually due it from royalties under the licenses issued to the defendant and its said affiliate or subsidiary, Veneer Products Company, without a full, true and correct account being made by the defendant of the number of baskets manufactured and sold under said licenses including the baskets manufactured by said Veneer Products Company under the domination and control of the defendant and sold by or through the defendant.”

3. Strike out paragraphs 1 and 2 of the prayer and insert in lieu thereof a new paragraph reading as follows:

“That plaintiff may have judgment against the defendant for the sum of \$16,437.48 with interest as provided by law.”

Dated August 11, 1942.

**RICHARDS & HAGA**

Attorneys for Plaintiff

Residence: Boise, Idaho.

**ORDER**

The foregoing amendments are allowed and may be made by interlineation.

Dated August 11, 1942.

**CHARLES C. CAVANAH**

District Judge

[Endorsed]: Filed Aug. 11, 1942. [39]

[Title of Court and Cause.]

MINUTES OF THE COURT OF  
AUGUST 11, 1942

This cause came on for hearing on the plaintiff's motion for summary judgment.

The plaintiff's counsel, O. O. Haga, Esquire, applied to the Court for leave to amend the amended complaint by interlineation. The defendant's counsel, George Donart, Esquire, offered no objections, whereupon the Court granted the application to amend, and granting the defendant time to answer the complaint as amended.

Hearing on the motion for summary judgment was continued to September 1, 1942. [40]

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[Title of Court and Cause.]

ADOPTION OF MOTION AND ANSWER

Comes now the defendant and adopts its motion to dismiss directed against the original complaint, and its answer to the original complaint as its motion to dismiss against all action alleged in the amended complaint, and as its answer to the

amended complaint; and it submits the same upon the record and evidence heretofore introduced.

GEO. DONART

of Weiser, Idaho.

FREDERICK P. CRANSTON

of 409 Equitable Bldg.,

Denver Colorado,

Attorneys for Defendant.

Defendant's Address:

Paris, Texas.

[Endorsed]: August 18, 1942. [41]

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In the District Court of the United States for the  
District of Idaho, Southern Division

No. 2152

THE STRAIGHT SIDE BASKET CORPORA-  
TION, a corporation,

Plaintiff,

vs.

CUMMER-GRAHAM COMPANY, a corporation,  
Defendant.

### SUMMARY JUDGMENT

This action came on for hearing this 1st day of September, 1942, on plaintiff's motion for summary judgment on the pleadings under Rule 56 of the Federal Rules of Civil Procedure; and the Court

having heard counsel for the parties and considered the record, the pleadings, affidavits, depositions, exhibits and evidence submitted by the respective parties; and it being admitted that defendant's answer to the complaint as amended presents the identical questions heretofore considered and determined by the Court in favor of plaintiff and against defendant on the latter's motion to dismiss,

It Is Hereby Ordered And Adjudged that the plaintiff, The Straight Side Basket Corporation, have judgment against the defendant Cummer-Graham Company, a corporation, for the sum of \$16,437.48, with interest thereon from the 1st day of July until the date hereof at the rate of 6% per annum, which interest amounts to the sum of \$164.37, and making in the aggregate of principal and interest as of this date the sum of \$16,601.85, and judgment for said sum is hereby entered against said defendant together with costs taxed at \$232.14, and plaintiff may have execution therefor.

Done in open court this 1st day of September, 1942.

CHARLES C. CAVANAH  
District Judge

[Endorsed]: Filed September 1, 1942. [42]

[Title of Court and Cause.]

DEPOSITIONS OF C. H. KINNEY,  
A. V. KINNEY & A. C. MACKIN

Appearances:

Ned Stewart,  
Texarkana, Texas,  
Attorney for Plaintiff.

O. B. Fisher,  
Paris, Texas,  
Attorney for Defendant.

The Depositions of C. H. Kinney, A. V. Kinney, and A. C. Mackin, taken at the office of O. B. Fisher, 501 Liberty National Bank Bldg., Paris, Texas, to be read in evidence in the above styled cause, said depositions being taken by agreement of counsel for both parties with all formalities waived, the taking, transcribing and forwarding of said depositions also being waived, as well as the signatures of the witnesses, reserving, however, the right to except at the time of the trial or hearing to any evidence so introduced for any reason whatever.

It is also agreed and understood that a copy of these depositions may be used in evidence in any other case pending in any other court between the same parties to this suit, and particularly in the case pending in U. S. District Court for the Eastern District of Texas, Paris Division, styled Cummer-Graham Company vs. The Straight Side Basket Corp., a duplicate original to be filed in such case

of Cummer-Graham Company vs. The Straight Side Basket Corp. pending in the District Court of the United States for the Eastern District of Texas.

[43]

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MR. C. H. KINNEY

After being duly sworn, testified as follows:

Direct Examination

By Mr. Stewart, Attorney for the Defendant.

Q. Your name is C. H. Kinney?

A. That's right.

Q. You are a resident of Paris, Texas, Mr. Kinney, are you not?           A. I am.

Q. What position do you now hold with the Defendant, Cummer-Graham Company?

A. Sales Manager.

Q. Mr. Kinney, when the Summons involved in this case was originally served on you in Idaho, I believe on October 30, 1941, at Payette, Idaho, what position did you occupy at that time with Cummer-Graham Company?           A. Sales Manager.

Q. Now how long have you held the position of Sales Manager for Cummer-Graham Company?

A. I think it is since about November 1930—ever since I have been with them.

Q. Since some time in 1930?

A. '38. About November '38, I would say.

Q. Now what were you doing in Idaho on October 30, 1941, when the Summons was served on you in this particular case?

(Deposition of C. H. Kinney.)

A. Attending to general routine business.

Q. Were you attending to general routine business for the Defendant, Cummer-Graham Company?      A. Yes.

Q. Were you in Idaho at that time at the expense of Cummer-Graham Company?      A. Yes.

Q. Now what are your duties in connection with your title as Sales Manager for Cummer-Graham Company?

A. Traveling about twenty-six states, supervising sales, dealers—that is wholesalers, and assisting in sales work, taking orders, looking after collections—anything that comes up in the handling and selling of merchandise. [44]

Q. Does Cummer-Graham Company do quite an extensive business in Idaho?      A. Yes.

Q. In your capacity as Sales Manager do you have charge of the sales made in the State of Idaho?

A. Yes, supervise them. I might modify that though. In charge of them under the supervision of the board of directors of the Cummer-Graham Company. That is understood, I guess, in such a question.

Q. Now who composes the Board of Directors of the Cummer-Graham?

A. The Directors of Cummer-Graham.

Q. Who are those directors?

A. Mr. Mackin, Mr. McGill, Mr. DeShong, Mr. Norton and I guess Mr. Hudnell.



(Deposition of C. H. Kinney.)

Q. Are you a member of the Board of Directors yourself, Mr. Kinney?      A. I am not.

Q. Now who else besides yourself connected with Cummer-Graham Company has anything to do with the business transacted in Idaho or the sales in Idaho?

A. Now, or in the past? You would have to be more explicit.

Q. Speaking of around October 30, 1941.

A. Well there was no one working in Idaho at that time but me.

Q. Prior to October 30, 1941, have there been any other parties connected with Cummer-Graham looking after any of its sales or other business in the State of Idaho?

A. A. V. Kinney. Mr. McGill has been out there at times. Mr. Norton. I guess that would almost cover it.

Q. But on October 30, 1941, the date you were served with Summons in Idaho in this case, you were the only one in the State of Idaho at that time connected with Cummer-Graham Company?

A. That's right.

Q. Now Mr. Kinney, does Cummer-Graham Company own the Veneer Products Company?

A. The Veneer Products Company is a corporation.

Q. Does Cummer-Graham Company own the controlling stock in that corporation or any part of the stock? [45]

(Deposition of C. H. Kinney.)

A. That, I don't know.

Q. Where are the records of the Veneer Products Company Inc. kept?

A. At the office of the Cummer-Graham Company.

Q. In Paris, Texas?           A. In Paris.

Q. But you do not know yourself as to whether or not Cummer-Graham owns the majority or any part of the corporate stock of the Veneer Products Company?           A. No, I don't know that.

Q. Now who is the President of the Veneer Products Company?           A. I am.

Q. Does the Veneer Products Company sell any of their merchandise direct in the State of Idaho?

A. It does not.

Q. Does the Veneer Products Company sell all of their production to Cummer-Graham?

A. They do.

Q. Is the Veneer Products Company a Texas corporation?           A. It is not.

Q. Under the laws of what state is the Veneer Products Company incorporated?

A. Colorado.

Q. State, if you know, whether or not a complete set of records separate and apart from the Cummer-Graham records is kept for the Veneer Products Company here in the general offices of the Cummer-Graham Company?

A. Yes, complete separate records.

Q. Now Mr. Kinney, can you give a rough esti-

(Deposition of C. H. Kinney.)

mate of the volume of sales in Idaho for the year 1941 made by Cummer-Graham Company? [46]

A. 1941—I couldn't under that description. The Cummer-Graham fiscal year is June to June and the records of course on that is part '41 and '42 and '40 and '41.

Q. Then can you give an estimate on the volume of business conducted within the period from June 1940 to June 1941?

A. Yes. It would be an estimate without referring to the books, and would you want the undelivered price, with or without freight?

Q. It really doesn't matter. If you can, estimate the number of carloads shipped to Idaho.

A. Oh, I would say close to two hundred cars, all types of containers.

Q. That estimate of two hundred cars represents all types of containers shipped by Cummer-Graham Company to destinations in Idaho? A. Yes.

Q. Now Mr. Kinney, does Cummer-Graham Company sell direct to orchard owners in Idaho?

A. No, the business is carried on through jobbers or wholesalers.

Q. Then as I understand your answer, no shipments are made direct to orchard owners?

A. There is no direct policy against it except it isn't handled that way.

Q. And all of your business is sold through jobbers or distributors in Idaho? A. Yes.

Q. Now does Cummer-Graham ever ship any containers to itself in Idaho?

(Deposition of C. H. Kinney.)

A. Yes. Never delivers to itself.

Q. Mr. Kinney, are there numerous instances in which Cummer-Graham is the consignor and also the consignee in bills of lading covering shipments of containers to Idaho? A. Yes. [47]

A. (Contd.) It is necessary under what we call the "roller system".

Q. Are any of these cars diverted after they reach Idaho?

A. They are all diverted somewhere in transit.

Q. In those shipments made by Cummer-Graham Company to Cummer-Graham Company do you use any particular point in Idaho as the destination?

A. Diversion point is generally Nampa.

Q. That's in Idaho?

A. Yes, Nampa, Idaho.

Q. Then from time to time, as those cars reach Nampa, Idaho, they are diverted to other parties or concerns in Idaho? A. Correct.

Q. Now do you have authority to divert those cars for Cummer-Graham Company? A. Yes.

Q. And did you from time to time divert the cars?

A. Very seldom. As a rule they are shipped in care of one of the agents, Reilly-Atkinson or Hogue and the diversions are handled by them. If anything should happen in an emergency that they were needed quick, I wouldn't have time to handle all those things.

(Deposition of C. H. Kinney.)

Q. And I believe you said that in some instances you did handle diversions?

A. Yes, I have handled diversions, both Paris and Idaho. Very often handle from the Paris office.

Q. But you also have handled some of the diversions in Idaho? A. Yes.

Q. Now when Reilly-Atkinson or Mr. Hogue handle the diversions who gives them their instructions?

A. They come from the Paris office.

Q. If the diversions are made at a time when you are in Idaho do you have authority to give them instructions? [48]

A. For diversions?

Q. Yes sir. A. Yes.

Q. Now Mr. Kinney, do you spend any considerable length of time in Idaho during the harvest season?

A. Oh, it is all according to conditions. Sometimes more time than others. Generally a week or ten days at a time and back two or three times in a season.

Q. Does Cummer-Graham maintain any kind of an office in Idaho? A. They do not.

Q. Have they ever maintained any kind of an office?

A. No. You are speaking of the Cummer-Graham Company?

Q. Yes. I believe you said in your affidavit

(Deposition of C. H. Kinney.)

which was filed in this case in support of Cummer-Graham's motion to dismiss that you spend a maximum of two months per year in Idaho.

A. That's approximately correct. That wouldn't be all at one time.

Q. Then while you are *in* Idaho, Mr. Kinney, state specifically just what you do for Cummer-Graham while you are out there.

A. Oh my! There are so many things pertaining to sales work, keeping customers sold on your product, specialty work helping your dealers increase their sales, looking after collections, seeing that your money comes in—everything connected with sales work, I would say.

Q. Do you call on your customers from time to time while you are out there and make sales to them?      A. Dealers.

Q. To growers, or owners of the orchards?

A. Oh, I call on lots of them.

Q. Do you make any direct sales to owners of the orchards?      A. No.

Q. Do you make any direct collections while you are in Idaho from the orchard owners?

A. Well I wouldn't say. I don't think I have. I would if I could. Any collection work is done to help your dealer out—get his money in. [49]

Q. Are the charges in all instances made by Cummer-Graham Company against the jobbers or distributors in Idaho for Cummer-Graham Company?

(Deposition of C. H. Kinney.)

A. Practically all times. There might be some exceptions. A dealer might write you to send a sight draft car out to someone direct or something like that.

Q. Now at one time, Mr. Kinney, didn't you have an office in Reilly-Atkinson Warehouse in Payette, Idaho?           A. Me?

Q. Yes sir.

A. No. Just to help you out, my brother did.

Q. Then when you are in Idaho, do you make any direct sales to the consuming trade?

A. You will have to get into a much discussed (and cussed) definition.

Q. What I mean is do you go out and call on the owner of an orchard and make a sale to him of the products of Cummer-Graham Company and then ship that order to one of your jobbers or independent dealers?

A. The calls made on the growers are generally in company with the salesman of the jobber or dealer.

Q. Then if you make a sale to a grower the sale is actually credited to the jobber or dealer with whom you are calling on the customer at the time?

A. That's right.

Q. You do actually solicit business for Cummer-Graham while you are out there?

A. I am salesman—yes.

Q. And you also solicit business for the jobbers or independent dealers of Cummer-Graham in Idaho?

(Deposition of C. H. Kinney.)

A. Anything that will help promote sales.

Q. Now while you are in Idaho, Mr. Kinney, do you make any collections from these jobbers or independent dealers? [50]

A. Well there happen to be a class that if you don't make the collection you push them up to send the money in, because if you could, you would make the collection.

Q. Do you make new agreements from time to time in Idaho with the jobbers or independent dealers for Cummer-Graham Co.?

A. No. The agreements are pretty well set at the beginning of the year by the directors and they carry through—very little change in them from year to year.

Q. But when you are in Idaho, do you have to follow through with any directions given you by the directors as to any new contracts or any contracts that might be carried over from year to year?

A. Any change of policy has to be approved by the Board of Directors. Any written order taken has to be approved in writing by the Paris office before it is considered valid, and so stated in the sales order blank.

Q. For instance, Mr. Kinney, if you had some change of terms and conditions to make with one of your jobbers or independent dealers in Idaho and the Board of Directors authorized that change and ordered you to negotiate with the jobber or independent dealer to make the change, did you, while you were in Idaho attempt to do that?



(Deposition of C. H. Kinney.)

A. Did I attempt to do it?

Q. Yes sir.

A. I didn't know anything come up where such an order had been issued.

Q. Then you state there has not been a condition come up similar to that?

A. Not that I can recall, recently.

Q. Are there any times when you actually get a check from one of your jobbers or wholesale distributors and forward the check yourself to Cummer-Graham Company's office at Paris, Texas?

A. I would say it would be possible. I can't remember any exact instances. [51]

Q. Now in getting ready for the harvest season in Idaho, state whether or not, Mr. Kinney, you go to Idaho and confer with your jobbers and wholesale distributors in order to determine the approximate amount of their needs during the coming harvest season?      A. Yes.

Q. Then after that estimate is determined do you convey that information back to Cummer-Graham Company here in Paris?

A. Generally back here. Handle it in my reports. I am never gone very long at one time.

Q. Will you give us the names of some of your jobbers and independent distributors in Idaho?

A. As they exist now?

Q. Yes sir.

A. Reilly-Atkinson Company, Boise, F. C. Hogue, Payette.

(Deposition of C. H. Kinney.)

Q. Do you remember any additional jobbers or independent distributors you might have?

A. I think that's all we have right now. We have had others.

Q. Now Mr. Kinney, in the affidavit which I referred to a few minutes ago which was filed in support of Cummer-Graham's motion to dismiss, you stated that Cummer-Graham had been represented in its business transactions in Idaho at various times by Arthur V. Kinney, Wallace Norton, J. C. DeShong and J. A. McGill. Do all of these parties also make trips to Idaho?

A. Only on special occasions.

Q. And on those special occasions when they do make those trips, who are they in Idaho representing?

A. Cummer-Graham Company, if they go out for Cummer-Graham Company. I don't know whether they make any individual trips or not. I wouldn't try to testify on that.

Q. Now if I am correct in my assumption I believe the fruit harvest starts in Idaho some time around the first of September, does it not?

A. Yes, earlier than that, some of it. [52]

Q. And is it during that harvest when you make your trips to Idaho?

A. Before, during and after. I make Idaho you see, going to other territories and double back through.

Q. Now Mr. Kinney, I believe C. N. Kinney was your father, was he not?

A. Right.

(Deposition of C. H. Kinney.)

Q. He is deceased now is he not?

A. That's right.

Q. Was he in the employ of Cummer-Graham Company?      A. No.

Q. Has he ever been in the employ of Cummer-Graham Company?      A. No.

Q. Now does Cummer-Graham Company own any orchard lands in Idaho?      A. No.

Q. Does anyone else as Trustee for Cummer-Graham Company have title to any orchard lands in Idaho?      A. No.

Q. You are familiar with the Hogue orchards are you not?      A. Yes.

Q. Does Cummer-Graham now or have they ever had a mortgage on those orchards?

A. No, not now or ever.

Q. Now who has operated the Hogue orchards during the 1941 season?

A. C. N. Kinney is Trustee for all the Hogue creditors, under a general assignment.

Q. And who paid C. N. Kinney for his services?

A. He paid himself.

Q. What kind of an agreement did he have with the trustees for all the creditors?

A. Well it was a basis of commissions on monies handled and general assignment agreement, such as you would be familiar with as adopted by the National Credit Men's Association.

Q. Did Cummer-Graham Company sign that agreement?      A. No. [53]

(Deposition of C. H. Kinney.)

Q. Were they one of the Hogue creditors?

A. No.

Q. Then Cummer-Graham Company was not interested in the Trustees' agreement which was executed by all of the creditors of Hogue in connection with the operation of his orchards?

A. No.

Q. Did Hogue owe Cummer-Graham Company at the time?           A. No.

Q. Did Hogue owe the Basket Sales Company of Dallas?           A. Yes.

Q. Didn't Cummer-Graham purchase from the basket Sales Company of Dallas certain notes and obligations of Mr. Hogue?

A. I don't know. I can't answer that. That is out of my department.

Q. Well do you know what became of the indebtedness of Mr. Hogue which was due the Basket Sales Company?           A. It hasn't been paid.

Q. Did Cummer-Graham Company have any interest financially or otherwise in the indebtedness due by Mr. Hogue to the Basket Sales Company of Dallas?

A. In that the Basket Sales Company owed Cummer-Graham.

Q. Now do you know whether or not the Basket Sales Company ever assigned all or any part of the Hogue account to Cummer-Graham Company?

A. I know they didn't.

Q. Did Cummer-Graham Company ever collect what the Basket Sales Company owed them?

(Deposition of C. H. Kinney.)

A. No, not entirely.

Q. Now your father under that agreement actually had charge of the growing and the sale and disposition of the crop from those orchards?

A. Yes.

Q. And he was employed on a strictly commission basis under the terms of this agreement signed by Mr. Hogue's creditors?

A. The terms of the agreement speak for itself. I wouldn't try to remember exactly what it said. [54]

Q. Now in your affidavit which I have referred to several times, you state that "except for indebtedness due Cummer-Graham that Cummer-Graham has not acquired and does not own a substantial or any amount of orchard property in Idaho." Now what do you mean by the words "except for the indebtedness due Cummer-Graham"?

A. Now if you will analyze that, any property in Idaho except indebtedness, accounts receivable.

Q. Now does Cummer-Graham Company have a chattel mortgage or any other kind of mortgage or any instrument securing any indebtedness on any orchard or orchards in Idaho?           A. No.

Q. And does Cummer-Graham Company by virtue of any trust agreement or otherwise have anyone holding title to any lands in Idaho for Cummer-Graham Company?           A. No.

Q. Who now owns the Hogue orchards?

A. Hogue.

(Deposition of C. H. Kinney.)

Q. Have they been sold back to him by the creditors or was the indebtedness worked out?

A. No. You see they transferred to the trustees. The trustee takes the position of Hogue.

Q. In whose name is the title now?

A. In the names of Scott Brubaker for Hogue, appointed by the court at the death of C. N. Kinney.

Q. Was that the court in Colorado?

A. Idaho.

Q. At Payette, Idaho?

A. I don't really know which court it is in. I would believe that would be right though.

Q. And I believe you stated Mr. Kinney that Cummer-Graham now has no interest whatever in the Hogue orchards.

A. Not any.

Q. And Cummer-Graham have never had any interest in the Hogue orchards?

A. Never.

Q. Now was Mr. F. H. Hogue one of your independent distributors in the State of Idaho at one time?

A. No sir. F. C. I said. [55]

Q. Was F. C. Hogue then one of your independent distributors?

A. He was and is now. What do you mean by independent distributor?

Q. I mean one of your jobbers or distributors. Now in the sale by Cummer-Graham to these jobbers and distributors are the sales made on an open account?

A. Yes.

Q. Does Cummer-Graham Company retain the title to any baskets shipped to Idaho by any of these jobbers or distributors?

(Deposition of C. H. Kinney.)

A. They have a consignment agreement for any carry-over baskets.

Q. Then, if at the close of any harvest season a jobber or distributor of the Cummer-Graham Company have baskets to carry over to the following season, what arrangements does Cummer-Graham have with the jobber or distributor as to those particular baskets?

A. The account is carried over for him, with the baskets, so to speak, as collateral.

Q. Does Cummer-Graham take a mortgage on the baskets?

A. No. It is all done in good faith.

Q. Who carries the insurance on the baskets during——?

A. The jobber or distributor, with a "loss payable" clause to Cummer-Graham as the interest might appear.

Q. Then if a jobber or distributor carried over, we will say four carloads of baskets, Cummer-Graham Company carried the account for this jobber or distributor until the following season?

A. That's right, they do if requested. Sometimes they pay for them and carry themselves but if they need help we carry them.

Q. And if this is done, the baskets are stored in Idaho in the jobber's or distributor's warehouse?

A. Wherever they happen to be, I guess, at the time.

(Deposition of C. H. Kinney.)

Q. The jobber or distributor then takes out insurance with loss payable to Cummer-Graham Company as its interest might appear. A. Right.

Q. Now who pays for the insurance premium?

A. The jobber or distributor. [56]

Q. And who pays for the storage?

A. The jobber or distributor, generally in their own warehouse.

Q. Now when these baskets are finally sold and payment has been made to Cummer-Graham Company, is any consideration given to the insurance or storage as paid for by the jobber or distributor, when final settlement is made?

A. Not any.

Q. Although, by a "gentlemen's agreement" as you say, if the baskets carried over were destroyed by fire and there was an adjustment to be made with the insurance company carrying the fire insurance, if these baskets had not been paid for by the jobber or distributor, then Cummer-Graham would collect the loss as its interest might appear?

A. Good.

Q. Well, would they or would they not, Mr. Kinney? A. Haven't had it occur.

Q. If it did occur what would be the position of Cummer-Graham Company?

A. I imagine it would be according to the statement of the jobber and his financial set-up and how badly he needed the money and how badly we needed it and other conditions that would come up at the



(Deposition of C. H. Kinney.)

time the request was made. I think it would be handled on its merits. That would be something for the Board of Directors to decide at that time.

Q. Does Cummer-Graham at the present time have any kind of security whatever either in the form of a note or mortgage or anything executed by Mr. F. H. Hogue?

A. Cummer-Graham Company?

Q. Yes sir.           A. No sir.

Q. Does F. H. Hogue at the present time owe Cummer-Graham Company anything, if you know?

A. That I don't know.

Q. Mr. Kinney, are any of your jobbers or distributors out there also growers?

A. At the present time, no.

Q. Were any of your jobbers or distributors during the year 1941 growers?

A. No. They could have been, but didn't happen to be.

Q. In connection with your trips to Idaho, state whether or not you devote any portion of your time to the sale of a [57] certain basket known as the "stitched-in bottom" basket?

A. It is one of our products.

Q. Do you devote any considerable amount of time in Idaho to encouraging the sale and use of this particular basket?

A. No more than any of our products. Gets equal treatment I guess.

Q. Does the "stitched-in bottom" basket consti-

(Deposition of C. H. Kinney.)

tute a substantial portion of the sales made in Idaho or not, by Cummer-Graham Company?

A. A very small percent of the sales.

Q. Now in 1940 and 1941, state whether or not Cummer-Graham Company, in addition to their own products and the products made by the Veneer Products Company sold other baskets in Idaho which were manufactured by other firms and in turn sold to Cummer-Graham for delivery to Idaho?

A. No. Not for delivery in Idaho.

Q. Did they purchase from other firms with any particular delivery in view?      A. Yes.

Q. Now do you recall any of the firms from whom Cummer-Graham Company purchased baskets for resale by Cummer-Graham Company?

A. Yes, I believe we purchased some from Peacock. '40 and '41 I believe is what you have in mind in your question?

Q. Yes.

A. Trinity Manufacturing Company, Dayton Veneer Mills. I believe that's all.

Q. Now in what state does Cummer-Graham Company sell the most baskets each year?

A. Texas.

Q. What state would come next?

A. Baskets alone you mean?

Q. Well, baskets and other products.

A. Let me see. I haven't really studied it from that viewpoint.

Q. How far down the line or up the line would

(Deposition of C. H. Kinney.)

the State of Idaho rank in total volume of business done by Cummer-Graham Company?

A. It would rank foremost among the western states. Colorado and Idaho would run pretty close tie, I guess. [58]

Q. Are any of the baskets which are sold by Cummer-Graham Company in Idaho manufactured under the patent rights owned by the Straight Side Basket Corporation?

A. Would you state that again?

Q. Are any of the basket sold by the Cummer-Graham Company in Idaho manufactured under the patents owned by the Straight Side Basket Corporation?

A. Lots of them.

Q. Does Reilly-Atkinson of Boise receive a commission from Cummer-Graham Company on all baskets of a certain type sold in the State of Idaho?

A. Yes.

Q. And do you have what you call a so-called consignment contract with the Reilly-Atkinson Company?

A. We handle it as such, I would say.

Q. Do you have any kind of a written agreement with Reilly-Atkinson Company?

A. Well, we have one. I don't know how old it is but we have just carried it forward and extended it from year to year.

Q. And would you, Mr. Kinney, for the purpose of this record supply the stenographer with a copy of any agreement which Cummer-Graham Company might have with Reilly-Atkinson Co.?

(Deposition of C. H. Kinney.)

A. I couldn't so promise. I don't even know if I could find it.

Q. If you could find the agreement with the Reilly-Atkinson Company would you furnish the stenographer for the purpose of this record and as Exhibit A to your testimony a copy of said agreement? A. Yes.

Q. Now do all of your jobbers and distributors wait until they have sold every carry-over basket before they pay Cummer-Graham Company?

A. No, I wouldn't say it worked either way. Sometimes they don't pay after they have sold them.

Q. And when final settlement is made with Cummer-Graham Company for the carry-over baskets, I believe you stated that Cummer-Graham does not bear any part of the expense of insurance and storage. A. That's right. [59]

Q. Now in connection with the so-called roller cars, have there been any occasions, Mr. Kinney, when any of these roller cars were sold by you to parties or firms or concerns in Idaho while you were there in Idaho during the harvest season?

A. I don't know as designated as roller cars. Possibly yes and possibly no. It would be in the regular course of business whatever it was. That's what the rollers are for.

Q. If you had in transit ten roller cars shipped from Cummer-Graham Company at Paris, Texas to Cummer-Graham Company at Nampa, Idaho, and you were in the State of Idaho at the time,

(Deposition of C. H. Kinney.)

would you make an effort to sell those ten cars prior to the time they reached their destination?

A. These rollers are always carried in care of someone like Atkinson and Hogue so it doesn't necessitate one of us being there.

Q. But in the event you are in Idaho and you are familiar with the fact that ten roller cars are moving, is it a portion of your duties in connection with Cummer-Graham Company to try to sell those ten cars of products?

A. No. Not necessarily as the ten cars.

Q. Well, do you try to sell any of these products while you are there?

A. Well, I try to sell all our products but not all the ten cars at one time.

Q. Well, assuming for the sake of argument you had ten so-called roller cars moving during the harvest in Idaho——

A. You mean are we apt to be in trouble there?

Q. Yes sir.

A. No, because they would go to one of the dealers. They are not shipped unless they have a home with either of the dealers. In case he doesn't want to divert it to special customers, he automatically takes them in if he hasn't got them placed.

Q. Now on the other hand, do you make an effort to sell any of these products while you are there in Idaho? [60]

A. I make an effort to sell all our products. That is part of my job.

(Deposition of C. H. Kinney.)

Q. Then if you had some roller cars moving to Cummer-Graham Co. at Nampa, Idaho while you were in Idaho and you sold two cars of the products, in this particular case who would advise the railroad company of the diversion?

A. I would get in touch with Hogue or Atkinson, whichever the cars were for and either have them divert it or have them mark their records I was diverting, one of the two.

Q. I believe you have already stated that in some instances you actually did the diverting.

#### Cross-Examination

By Mr. Fisher, Attorney for Defendant.

Q. Mr. Kinney, not definitely understanding the answer made by you a few minutes ago with reference to Cummer-Graham Company having at some time in the past purchased some product from some other manufacturer, you are asked to state whether or not within your knowledge Cummer-Graham or anyone acting for Cummer-Graham Company at any time purchased in the State of Idaho any products made by any other manufacturer?

A. Never.

Q. In the same connection please state whether or not Cummer-Graham Company, acting through any person, within your knowledge, at any time purchased any products of any character from any manufacturer to be delivered to Cummer-Graham Company in the State of Idaho?      A. Never.

Q. Mr. Kinney, I believe you stated that at the

(Deposition of C. H. Kinney.)

time process was served upon you in Idaho on this case you were on routine business or something to that effect.

A. Yes, the day it was served, I had just got in there from California.

Q. Please state your exact capacity with Cummer-Graham Company at that time.

A. I was Sales Manager. [61]

Q. How long had you held such position?

A. Since 1938.

Q. As Sales Manager, what are your duties, briefly but completely.

A. Supervise the sale and distribution of baskets, my duties are.

Q. As such, have you any authority to pass upon credits or contracts?      A. No.

Q. As such, have you any authority through the Board of Directors of that company or any executive officer of the company to do anything other than promote the sales of the products for the corporation?      A. That's all.

Q. Have you at any time in the State of Idaho attempted to make any contract on behalf of Cummer-Graham?      A. No.

Q. Has Cummer-Graham at any time in the State of Idaho, through you or within your knowledge received any products of any character for sale in the State of Idaho or elsewhere?

A. Never, that I know of.

Q. Mr. Stewart in his examination used the

(Deposition of C. H. Kinney.)

term "roller cars". Please explain what is meant by that term, if in your merchandising it has special meaning.

A. In fruit districts that are quite a ways from the factory, such as Idaho, and there are others, it takes sometimes twelve or fourteen days to make delivery of a car of baskets. Baskets are used for perishable items and we find it necessary to start a certain number of cars, what we call rollers, rolling so as to have them subject to quick diversion as needed.

Q. About what is the length of time under the present railway transportation system required for the transportation of cars of baskets from Paris, Texas to points in Idaho?

A. Seven days is the quickest. They have no definite schedule.

Q. What is the usual time required?

A. Well it will take from seven to twelve days and time such as now we have had them delayed much longer, due to troop movements, etc.

Q. Has Cummer-Graham Company sold any products in Idaho except through wholesalers or jobbers?

A. Not that I can recall. I wouldn't say there would be anything against it in principle. [62]

Q. Has Cummer-Graham at any time sold any of its products except in carload lots? A. No.

Q. Has it sold in the State of Idaho any products except products moving in interstate commerce from Paris, Texas, to that state?



(Deposition of C. H. Kinney.)

A. Nothing except moving in interstate commerce from different factories in Texas. Not all from Paris.

Q. Under the sales agreement and purchase agreement between Cummer-Graham Company and the respective jobbers in the State of Idaho during the years 1940 and '41, were shipments charged to the account of the purchasers at the time of the shipment and not otherwise or were different quantities of products sold to the jobber or purchaser at the beginning of the season for which such purchaser or purchasers were bound to pay?

A. Each car is charged as a separate item.

Q. With reference to the roller cars, when were charges made against buyers?

A. At the time the diversion was made. I would modify that a little. I think the books will show they were charged to the one they are shipped in care of at the time they are shipped. The Paris office charges them for the car. If the car is shipped care of Reilly-Atkinson, it is charged to Reilly-Atkinson and then if a diversion is made to Hogue Reilly-Atkinson receives credit.

Q. Then do we understand at the time the diversion is made, credit is given to the jobber in whose care the shipment was made and a charge made against the other person receiving the shipment through diversion?

A. Yeah.

Q. Were any roller cars put in motion by Cummer-Graham at any time during either of the years mentioned except from the State of Texas?

(Deposition of C. H. Kinney.)

A. No.

Q. I have reference to the origin of shipments except any point in Texas.

A. We had some shipments originate in Georgia during the years 1940 and 1941.

Q. Did any shipments originate at any time during either of those years in the State of Idaho and reach their destination [63] in the State of Idaho?

A. No.

Q. Did you or did you not at any time have authority to divert any shipment between Texas or Georgia and the State of Idaho to a customer other than the customer in whose care the shipment was made, without the credit of such customer to whom the shipment was diverted being approved by the home office of Cummer-Graham or its Board of Directors?

A. I wouldn't have any authority without approval.

Q. Did you ever at any time make any diversion without the approval of the Board of Directors of your company of the credit of the person to whom it was made and the sale to that person?

A. No.

Q. Did or did not the firms referred to by you as Reilly-Atkinson and Hogue, at any time within your knowledge have any connection with Cummer-Graham Company other than as a wholesale purchaser of Cummer-Graham Company's products?

A. Not any.

(Deposition of C. H. Kinney.)

Q. Was or was not either of those firms at any time the agent of Cummer-Graham Company, within your knowledge?      A. Never.

Q. That question was asked because it was recalled that some place in your testimony you referred to them as agents and this time I ask you to explain what you mean by that term?

A. The term of the trade—they are often referred to that way.

Q. If either was referred to as the agent of Cummer-Graham you meant that he or they were the purchasers of the Cummer-Graham Company's products as jobbers?      A. Yes.

Q. Testimony was given with reference to carry-over baskets and you will please state now whether or not the baskets when delivered to a jobber, or rather when shipped to the jobber, are charged to him?      A. They are.

Q. When are the accounts payable as to whether they are payable on demand or within ten days or twenty days or thirty days or fifteen days

A. It varies very often with the size of the credit approved, but is oftentimes changed. [64]

Q. Had you at any time the authority to make credit arrangements even to the extent of fixing the time of the due date of the account or was that left to the Board of Directors of the Cummer-Graham Company?

A. That is all done by the Board of Directors.

Q. Did you or did you not at any time indepen-

(Deposition of C. H. Kinney.)

dently and not in behalf of some jobber in the State of Idaho attempt to sell or sell to any individual grower any products of Cummer-Graham? What I am trying to ask, in making sales, were you helping the jobber to make sales or were you trying to make them independently of the jobbers?

A. I try to help the jobbers. We have to pay them anyway.

Q. You do, while in that state, render all assistance possible to increase their sales?

A. Yes, I render all the assistance possible to help them out.

#### Re-Direct Examination

By Mr. Stewart:

Q. Mr. Kinney, when you are in Idaho, doing this special work in connection with the jobber or distributor for Cummer-Graham, you are acting at that time in behalf of Cummer-Graham, are you not? A. I work for Cummer-Graham.

Q. And your salary and expenses during the time spent in Idaho are paid by Cummer-Graham Company? A. Yes indeed.

Q. Now Mr. Kinney, you don't mean to say that if you are in Idaho and want to divert a car that you have to get in touch with the Paris office and they have to call a meeting of the Board of Directors and authorize you to divert that car, do you?

A. I would say that I don't know whether they call a meeting of the board of directors. They have

(Deposition of C. H. Kinney.)

some of the directors meet to pass upon whatever was involved. If it was a new account, for the credit it might take. If that should come up, yes, we would have to go that route. [65]

Q. Mr. Kinney, do you not frequently use your own judgment in connection with the diversion of these cars?      A. It isn't necessary.

Q. Well don't you frequently divert these cars without calling anyone?

A. These cars in Idaho are charged to the jobber and the diversion instructions are generally for his customer.

Q. But what I mean, Mr. Kinney, is that if some of the roller cars are started from Paris, Texas to Nampa, Idaho with Cummer-Graham Company as the consignor and Cummer-Graham as the consignee and you sell a car to a customer of one of the jobbers whose credit you know by experience is satisfactory, then is it not a fact that you use your own judgment and direct the railway company to divert that car to the customer?

A. Not without the approval of the jobber.

Q. Assuming then that you get the approval of the jobber, is it necessary that you get in touch with the office at Paris, Texas and get the approval of the Board of Directors of the company?

A. No. It has all been approved, the sale to the jobber.

Q. Then insofar as the interest of the Cummer-Graham Company is concerned, this particular fea-

(Deposition of C. H. Kinney.)

ture in connection with the sale of products shipped in roller cars is left up to your judgment, together with the judgment of the jobber in Idaho, is it not?

A. I don't say it is left to my judgment. Many of these answers are set before you start.

Q. Now if roller cars are shipped to Nampa, Idaho with Cummer-Graham Company as the consignor and Cummer-Graham Company as the consignee, why is it necessary that you invoice these particular cars to some jobber in Idaho?

A. Because they are invoiced to Cummer-Graham, care of different jobbers. They are billed that way.

Q. Do you in every instance have to get the jobber's approval before the cars can be diverted? [66]

A. I don't know that answer. You are asking about the things that don't come up in our regular course of business.

Q. Well, as a matter of fact, Mr. Kinney, what you are really interested in is the sale of Cummer-Graham products in Idaho?

A. That's right—not in Idaho—every place.

Q. Or in any other state for that matter?

A. That's right, the sale of Cummer-Graham products.

Q. And in shipping these roller cars with Cummer-Graham as the consignor and Cummer-Graham as the consignee, isn't it a fact that you are simply trying to get so many additional products on the ground during the harvest where you are

(Deposition of C. H. Kinney.)

able to make a quick sale of these products to persons having a demand for the products?

A. It is not often that. It is more of being able to service a deal according to the best interests of your customers and their customers, but lots of times in fresh fruit deals, they don't know today just when they are going to need their products—things ripen faster or slower and it is a service deal more than anything else.

Q. Isn't your presence necessary in Idaho during a portion of the harvest from that same standpoint, namely, service?

A. No. In fact we are spending less and less time in the territories.

Q. Mr. Kinney, are you familiar with the conveyance which was made on February 14, 1941, by F. H. Hogue to C. N. Kinney of nine different pieces of property in Payette County, Idaho?

A. Somewhat.

Q. Can you state what was the consideration for that conveyance?

A. To C. N. Kinney you are speaking of?

Q. Yes, the conveyance from F. H. Hogue to C. N. Kinney. What was the consideration of that?

A. Named in the Trustee's agreement?

Q. Or not named in the Trustee's agreement.

A. I don't know. I think it was a dollar or however those agreements are drawn. I really wouldn't know. I think I read it at the time. [67]

Q. Without taking into consideration whatever

(Deposition of C. H. Kinney.)

consideration was mentioned in the conveyance, state if you know what was the actual consideration.

A. I don't know, if there was any.

Q. State whether or not any part of the consideration in this conveyance from F. H. Hogue to C. N. Kinney dated February 14, 1941 was the cancellation of all or any part of an indebtedness of F. H. Hogue to the Cummer-Graham Company?

A. No. Cummer-Graham Company aren't in it anywhere.

Q. But I believe you did state that C. N. Kinney held the property as trustee for the creditors of F. H. Hogue.

A. Um-huh.

Q. And you also stated that Cummer-Graham Company was not a creditor of F. H. Hogue at that time.

A. That's right.

Q. Did Cummer-Graham Company ever transfer any indebtedness due them by F. H. Hogue to anyone else, if you know?

A. I don't know.

Q. And I believe you also stated that upon the death of your father, C. N. Kinney, that the court in Idaho ordered the transfer of this orchard property to Scott Brubaker, Trustee and that Mr. Brubaker is also trustee for the creditors of F. H. Hogue.

A. Right. Now I make that statement as having been told to me and I take it for granted. I haven't seen the papers or the court orders or anything of that kind. I am repeating what I have been told.



MR. A. V. KINNEY,

having been duly sworn, testified as follows:

Direct Examination

By Mr. Ned Stewart, Attorney for Plaintiff:

Q. Your name is A. V. Kinney?

A. That's right.

Q. And where do you live Mr. Kinney?

A. Pittsburg, Tex.

Q. Are you connected in any capacity at the present time with the Cummer-Graham Company?

A. No sir.

Q. Have you at any time ever been connected with the Cummer-Graham Company?

A. Yes.

Q. When?

A. From I believe about November '38 until December 31, 1940.

Q. In what capacity during that period of time were you connected with Cummer-Graham?

A. Salesman.

Q. As such salesman, Mr. Kinney, did you do any work in the State of Idaho? A. Yes.

Q. Just explain briefly what work you did for Cummer-Graham Company in the State of Idaho.

A. General sales work in connection with our dealers in Idaho and sales promotion work for promotion of use of Cummer-Graham Company products.

Q. I believe at the present time you are connected with the F. E. Prince Company of Pittsburg, Texas, is that correct?

(Deposition of A. V. Kinney.)

A. That's right, yes sir.

Q. Now does the F. E. Prince Company ship any of its products direct to Idaho or does the F. E. Prince Company sell through the Cummer-Graham Company?      A. Neither.

Q. Does F. E. Prince Company have any customers in the State of Idaho?

A. This past year they have not.

Q. Did you while you were connected with the Cummer-Graham Company and working in Idaho call on the owners of the different orchards in Idaho in connection with promoting the sale and use of Cummer-Graham products?

A. I called on all shippers and anyone that might possibly use any of the products manufactured by Cummer-Graham. [69]

Q. During the time you were connected with the Cummer-Graham Company did you ever have an office in Idaho?      A. Yes.

Q. Where was this office?

A. It was in the Reilly-Atkinson warehouse in Payette.

Q. And approximately how long did you maintain that office in any one year?

A. Not over three months.

Q. Was all of the business of Cummer-Graham Company in which you were interested conducted from that particular office while you were there?

A. No sir.

Q. Was part of the business conducted from that office?      A. Part of it, yes sir.

(Deposition of A. V. Kinney.)

Q. Now while you were in Idaho and in the employ of the Cummer-Graham Company, Mr. Kinney, did you have authority to divert roller cars?      A. No.

Q. Did you ever divert any roller cars?

A. Yes, through the authority of the sales manager.

Q. And who was the sales manager?

A. C. H. Kinney.

Q. Were these roller cars shipped by Cummer-Graham Company at Paris, Texas to Cummer-Graham Company at Nampa, Idaho or any other points in Idaho?

A. In care of one of the dealers that we had.

Q. And on authority of Mr. C. H. Kinney, Sales Manager, you diverted some of those cars in Idaho?

A. Yes, to customers of our representative or dealer or broker, whichever term you use.

Q. Were there times Mr. Kinney when you and your brother, C. H. Kinney, were both in Idaho at the same time?      A. Yes.

Q. Were you there in the capacity of salesman for Cummer-Graham Company?      A. Yes.

Q. And was Mr. C. H. Kinney there in the capacity of sales manager for Cummer-Graham Company?

A. To the best of my knowledge. [70]

Q. Mr. Kinney, are you personally acquainted with the officials of the Simms Fruit Ranch at Houston, Idaho?

(Deposition of A. V. Kinney.)

A. I don't know what you mean by the officials.

Q. Any of the officials or persons who have charge of the operation of that ranch.

A. Yes.

Q. Was the Simms Fruit Ranch at Houston, Idaho one of Cummer-Graham's distributors in Idaho while you were working for Cummer-Graham? A. They were at one time.

Q. Does not the Simms Fruit Ranch also own and operate extensive orchards in that territory?

A. Yes.

Q. Now were you acquainted with a Mr. Marquardsen who lived near Buhl, Idaho?

A. Yes.

Q. Was he a distributor of the Cummer-Graham Company? A. No sir.

Q. So far as you know did Cummer-Graham ever sell him any of their products direct?

A. No sir, they did not, so far as my knowledge. Only through Reilly-Atkinson Company.

Q. Are you acquainted with John Hoover, at Council, Idaho? A. Yes.

Q. Was he a distributor for Cummer-Graham Company products during the time you were in the employ of Cummer-Graham? A. No.

Q. Are you acquainted with Harry Heller at Filer, Idaho? A. Yes.

Q. Was he a jobber or distributor for Cummer-Graham Company products?

A. Well that is rather a difficult question to

(Deposition of A. V. Kinney.)

answer just in that way. The best of my knowledge, he was part of the organization of Reilly-Atkinson Company.

Q. Does Mr. Heller not own and operate certain orchards property in Idaho?      A. Yes.

Q. Does not John Hoover own and operate certain orchards property in Idaho?      A. Yes.

Q. Mr. Kinney, state if you know approximately how many customers Cummer-Graham Company had in Idaho, just approximately.

A. Well that depends on what you call a customer. Do you call a customer, customers of our dealers in Idaho our customers?

Q. That's right, including customers to whom your *dealers*— [71]

A. Through our dealers we had many connections. I imagine around twenty or twenty-five, something like that.

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MR. A. C. MACKIN,

being duly sworn, testified as follows:

Direct Examination

By Mr. Ned Stewart, Attorney for Plaintiff:

Q. Mr. Mackin, I believe your initials are A. C.

A. That's right.

Q. And you are Secretary and Treasurer of the Cummer-Graham Company?      A. Yes sir.

Q. How long, Mr. Mackin, have you occupied that position with Cummer-Graham Company?

(Deposition of A. C. Mackin.)

A. Since 1931.

Q. As such Secretary-Treasurer do you have charge of the books, records and accounts for the Cummer-Graham Company? A. I do.

Q. Mr. Mackin, you were present when Mr. C. H. Kinney, Sales Manager for Cummer-Graham Company testified and you heard his testimony with reference to the time spent in Idaho?

A. I did.

Q. During the time Mr. C. H. Kinney was in Idaho, did he ever mail to the Paris office of Cummer-Graham Company any checks or remittances that he collected while in Idaho?

A. I don't recall any this year.

Q. Do you recall any during the year 1941?

A. There might possibly have been some small remittances. I can't be certain about that. It was so unusual that I can't remember of it happening.

Q. Well let me ask you this question. Does Mr. C. H. Kinney make collections in the various territories in which he works?

A. It depends upon the territory.

Q. Well does he have authority from Cummer-Graham Company to collect in any territory?

A. We frequently direct him to do so. [72]

Q. Do you recall ever having directed him to collect anything in the State of Idaho?

A. We have told him to contact our dealers at various times and have them send us in some remittances.

(Deposition of A. C. Mackin.)

Q. Now while Mr. C. H. Kinney is in Idaho, does he from time to time send in orders to the Paris, Texas office of Cummer-Graham Company for the products manufactured by Cummer-Graham Company?

A. Usually our orders come from the dealers.

Q. To the best of your knowledge has Mr. C. H. Kinney ever sent in any order from Idaho?

A. I don't recall any from Idaho.

Q. Mr. Mackin, state, if you know, just what Mr. C. H. Kinney does during the time he spends in Idaho for Cummer-Graham Co.

A. His work is the general work of securing sales, contacting the dealers, jobbers or whatever you call them, and assisting them wherever he can.

Q. Are all of your shipments into the State of Idaho made through some jobber or distributor?

A. Yes sir, to the best of my knowledge.

Q. Do you recall ever having shipped any grower of fruit direct who was not a jobber or distributor of Cummer-Graham Company?

A. No sir I can't recall it. I am not too familiar with the terms of jobber or dealer. Usually they follow the Straight Side Basket Company's prescribed list.

Q. Now are you familiar Mr. Mackin with what they call the so-called roller car movement?

A. Fairly well.

Q. Were certain cars from time to time in 1940 and 1941 shipped by Cummer-Graham Company of

(Deposition of A. C. Mackin.)

Paris, Texas to Cummer-Graham Company in care of some jobber at some particular point in Idaho?

A. On that point, I don't recall a single car that went out in 1941 that was consigned to Cummer-Graham Company without there being either Reilly-Atkinson's or F. C. Hogue's name on the bill of lading, shipped in care of them, and it is [73] my recollection that practically every bill of lading was consigned direct to Reilly-Atkinson or F. C. Hogue at Nampa, as the case may be, without Cummer-Graham appearing as the consignee. There may have perhaps been a few cars shipped the other way but I don't at present recall a particular one.

Q. But if Cummer-Graham Company was both the consignor and the consignee, then the shipments were billed Cummer-Graham Company in care of some particular jobber in Idaho?

A. Yes sir.

Q. Now Mr. Mackin after those shipments reached Idaho, were they frequently diverted?

A. Quite frequently.

Q. And who had authority to divert those shipments?

A. Those diversions were usually handled from the Paris office if Reilly Atkinson Company himself did not handle them. The papers were all sent to Reilly Atkinson Company or F. C. Hogue as the case may be.

Q. Did Mr. C. H. Kinney while he was in Idaho actually direct any of the diversions?



(Deposition of A. C. Mackin.)

A. I don't know of any case.

Q. So far as you know Mr. Mackin, did C. H. Kinney while he was in Idaho have authority to divert any of those cars?

A. No sir.

Q. Do you know of your own personal knowledge whether he did actually divert any or not?

A. No sir, I do not. I am not that familiar with Reilly Atkinson Company or F. C. Hogue's arrangements.

Q. Now Mr. Mackin, assuming that you sell some dealer or jobber in Idaho more baskets during a particular harvest season than he could sell and this jobber or dealer had to carry over these baskets, does Cummer-Graham agree, if requested, to also carry over that part of the jobber's or dealer's account which is equal to the quantity of baskets which the dealer or jobber is carrying over for the season? [74]

A. We have never necessarily agreed to carry them over but sometimes we have carried them over when they have requested it.

Q. Then during the following season when final settlement is made in connection with the carry-over baskets, does Cummer-Graham Company take into consideration in connection with the final settlement the matter of insurance and of storage charges on these baskets from one season to another by the jobber or dealer in Idaho?

A. No sir.

Q. Then there is no discount or decrease in the

(Deposition of A. C. Mackin.)

original prices on account of the jobber or dealer carrying insurance or paying storage charges?

A. No sir, none whatsoever.

Q. Mr. Mackin do you frequently have carry-over baskets in Idaho?      A. We have, yes sir.

Q. And does Cummer-Graham Company take out any insurance on these carry-over baskets?

A. No sir.

Q. Does the jobber or dealer in Idaho take out insurance with a loss payable clause in favor of Cummer-Graham Company?

A. There may be some instances of it but I haven't seen the policy.

Q. Now when Cummer-Graham Company ships its products to the Reilly Atkinson Company, is there an understanding between Cummer-Graham and Reilly Atkinson prior to the shipments as to what price these products will be invoiced to the Reilly-Atkinson Company for?      A. Yes sir.

Q. Does the Reilly-Atkinson Company actually know at the time the shipments are made what the price figure is invoiced at?

A. Yes, they receive our invoice covering each shipment.

Q. Assuming that your company would ship ten cars of baskets to one of your jobbers or distributors in Idaho at some agreed price, say 1.85 a dozen, and this jobber or distributor had five cars of these baskets left over at the end of the season and you carried his account until the following season on

(Deposition of A. C. Mackin.)

those five cars of baskets and they were sold the subsequent season, does your company still collect the \$1.85 a dozen from that jobber for those baskets?      A. There have been times, yes sir. [75]

Q. Well I mean does it follow that general practice or custom?      A. Yes sir.

Q. Do you know of any times when there has been a decrease in the price of carry-over baskets?

A. Yes, I do.

Q. What factors govern whether or not you will collect the price for which the baskets were originally sold or whether there shall be a decrease in the price, if they are carried over until the following season?

A. That would depend upon the arrangement that Reilly Atkinson Co. would make with us.

Q. Now when would they make that arrangement?

A. Usually it is made in late spring or early summer.

Q. Is it in writing?      A. It has been.

Q. Was the arrangement you had with Reilly-Atkinson Company for the 1941 season in writing?

A. I am not certain of this situation for 1941. I believe it was a continuation of a prior arrangement.

Q. Mr. Mackin, will you make an effort to find whatever instrument in writing there was between Cummer-Graham Company and the Reilly-Atkinson Company which was executed at any time but which

(Deposition of A. C. Mackin.)

was in effect during the 1941 season, and identify a copy of that instrument as Exhibit A to your testimony and furnish the reporter with same?

A. Yes I will.

Q. Now Mr. Mackin, does Cummer-Graham Company have certain consignment contracts with its jobbers or distributors in Idaho?

A. The only contracts we would have in that connection would be the written contract that we are trying to locate.

Q. Who pays the freight on the shipments of baskets and other products by Cummer-Graham to these dealers or distributors in Idaho?

A. The jobbers and dealers pay the freight.

Q. Is it paid by Cummer-Graham at this end of the line and then charged to them? [76]

A. No, they pay it on the other end of the line and deduct it from their settlement.

Q. Now Mr. Mackin, are you an officer of the Veneer Products Company? A. I am.

Q. What is your official position with the Veneer Products Co.? A. Secretary-Treasurer.

Q. Does the Cummer-Graham Company own any of the Veneer Products Company stock?

A. No sir.

Q. Does anyone acting as Trustee for the Cummer-Graham Company own any of the Veneer Products Company stock? A. No sir.

Q. Then the Cummer-Graham Company has no interest whatever, directly or indirectly or through

(Deposition of A. C. Mackin.)

a trustee in the ownership of the Veneer Products Company?      A. No sir.

Q. Now are you familiar with the situation during the time the Basket Sales Company of Dallas was operating with reference to one of its customers or distributors F. H. Hogue of Idaho?

A. I am familiar with the Basket Sales Company but I don't know much, if anything, about its relationship with Hogue.

Q. Did the Cummer-Graham Company purchase any notes or accounts receivable of F. H. Hogue from the Basket Sales Company?      A. No.

Q. Did F. H. Hogue, during 1940 or 1941 owe Cummer-Graham Company anything?

A. No.

Q. I believe the records in Idaho show, Mr. Mackin that on February 14, 1941 F. H. Hogue conveyed to C. N. Kinney nine different pieces of orchard property in Payette County, Idaho. Did Cummer-Graham Company at that time have any interest whatever in the particular orchard property conveyed?      A. None that I know of.

Q. Do your records as Secretary and Treasurer of Cummer-Graham Company reflect that C. N. Kinney was at that time or has at any time subsequent thereto acted in the capacity of Trustee for Cummer-Graham Company in connection with this orchard property or any other orchard property in Idaho?      A. No sir. [77]

Q. Do you in you capacity as Secretary and

(Deposition of A. C. Mackin.)

Treasurer of Cummer-Graham Company know anything whatever about the actual consideration for the conveyance by F. H. Hogue to C. N. Kinney of the nine different pieces of orchard property in Payette County, Idaho in February 1941?

A. No.

Q. Was there any entry whatever made on the books of Cummer-Graham Company in connection with this conveyance? A. No.

Q. Now Mr. Mackin, does Cummer-Graham either directly or indirectly own any orchard property or any other property in the State of Idaho?

A. It does not.

Q. Does the Cummer-Graham Company now or have they at any time in the past *have* any interest whatever in the F. H. Hogue orchards property in Idaho? A. None.

Q. In February 1941, state whether or not C. N. Kinney was employed by the Cummer-Graham Company? A. He was not.

Q. Was Mr. C. N. Kinney ever employed by the Cummer-Graham Company? A. Never.

Q. Mr. Mackin, in the event you are unable to locate the contract with the Reilly-Atkinson Company, will you attempt to locate any contract with any jobber or dealer in Idaho and introduce into the record a copy of this contract and identify same as Exhibit B to your testimony and furnish the reporter with a copy? A. Yes, I will.

Q. Now on October 30, 1941, when Mr. C. H.

(Deposition of A. C. Mackin.)

Kinney was served with Summons in this case at Payette, Idaho, he was in the employ of the Cummer-Graham Company at that time?

A. He was.

Q. Do other representatives of the Cummer-Graham Company frequently go to Idaho in connection with the business of Cummer-Graham in that state?      A. Oh, rather infrequently. [78]

Cross-Examination

By Mr. Fisher:

Q. Mr. Mackin, have you stated that you are a director of Cummer-Graham Company?

A. I don't know whether I have stated it or not, but I am.

Q. You have stated that you were Secretary-Treasurer of the company.      A. That's right.

Q. Did you hold such office on October 30, 1941?

A. I did.

Q. Were you a director of the company on that date and prior thereto?      A. I was.

Q. You stated that Mr. C. H. Kinney on such date was an employee of Cummer-Graham Company. Please state in what capacity he was employed.      A. Sales Manager.

Q. How long had he held such position prior to that time or approximately how long?

A. Approximately three years.

Q. Was or was not Mr. C. H. Kinney on October 30, 1941 a director of Cummer-Graham Company?

(Deposition of A. C. Mackin.)

A. He was not.

Q. Was or was not he on such date an officer of Cummer-Graham Company?      A. He was not.

Q. Had he on that date any authority in connection with the management of Cummer-Graham Company and its affairs?      A. None.

Q. On that date did or did not he have any authority from Cummer-Graham Company, other than the privilege as sales manager, to take orders for products of the company, subject to acceptance by the company acting through its directors or a proper officer?

A. That was his sole authority and work.

Q. None other?      A. None other.

Q. Had he the authority to accept orders himself for the company or was it necessary that the orders be accepted by an officer of the company or the directors?

A. All orders are to be approved by the Paris office.

Q. When in that office and not out on the territory, did he have authority to accept them or was it necessary for some officer of the company to accept them?

A. It was necessary for an officer of the company to accept them. [79]

#### Re-Direct Examination

By Mr. Stewart:

Q. Mr. Mackin, when the summons was served



(Deposition of A. C. Mackin.)

on Mr. C. H. Kinney on October 30, 1941 at Payette, Idaho, Mr. Kinney was at that time representing Cummer-Graham Company in his official capacity as Sales Manager?

A. He was representing them in his capacity as Sales Manager, yes.

Q. And he was there on the time and expense of the Cummer-Graham Company? A. He was.

Q. And he was there looking after the business of the Cummer-Graham Company?

A. He was there fulfilling the duties of his office.

Q. And is it not a fact that Mr. C. H. Kinney remained in Idaho for some short period of time during the harvest season in connection with sales and promotional work for Cummer-Graham?

A. Yes, he was in Idaho a while this past fall. I don't know just how long.

Q. Does he not call on the trade and jobbers in Idaho and do any and everything necessary while he is there to promote the sale and use of the products manufactured by Cummer-Graham Company?

A. I believe those are some of his duties.

Q. And if some jobber or distributor is a little bit behind on his account I believe you stated that you or someone in the office would write a letter to Mr. C. H. Kinney in Idaho or in some other state where he might be to call on that jobber or distributor with the view in mind of adjusting a delinquent account or asking the jobber to remit for a delinquent account?

(Deposition of A. C. Mackin.)

A. We at times requested that he do that. More frequently we will write a letter to the jobber in question and send Mr. Kinney a copy of the letter.

Re-Cross Examination

By Mr. Fisher:

Q. Mr. Mackin, as Secretary-Treasurer and an officer of Cummer-Graham Company, please state whether or not Mr. Kinney has at any time as a representative of Cummer-Graham Company as Sales Manager or in any other capacity been authorized to make any remittances of any amount owing by any customer [80] to such customer, or in any manner adjust any account owing by any customer, by collecting a sum of money less than the full amount owing?

A. No, we have never directed him to undertake any such adjustment as that.

Q. You were asked something about his being privileged or it being a part of his job to adjust accounts, is the reason that question was asked, and I would like for you to state definitely now whether or not at any time he had any such authority?

A. The adjustment angle escaped me and it was purely a question of payment which we had in mind.

Q. Now state definitely whether or not Mr. Kinney at any time had authority to adjust any account between Cummer-Graham Company and any of its customers in any state?      A. He has not. [81]

MR. C. H. KINNEY,

recalled for further examination by Mr. Stewart:

Q. You are the same C. H. Kinney who previously testified in this case? A. I am.

Q. Mr. Kinney, do you know any of the officials or any of the people who are in charge of the Simms Fruit Ranch of Houston, Idaho?

A. I know the Simms boys, if that is whom you mean.

Q. Do they own and operate this orchard?

A. They operate it. Whether it is a corporation or partnership, I am not sure.

Q. Now do you know a Mr. Marquardsen who lives near Buhl, Idaho? A. Very well.

Q. Have you in your capacity as Sales Manager for Cummer-Graham Company ever sold any of the Cummer-Graham products to the Simms Fruit Ranch or to Mr. Marquardsen?

A. Yes, through Reilly-Atkinson Company.

Q. Do you recall having collected an account from Mr. Marquardsen while you were in Idaho at any time?

A. I don't recall. I may have.

Q. Now are either the Simms Fruit Ranch or Mr. Marquardsen jobbers or wholesale distributors for Cummer-Graham Company?

A. Marquardsen is not, although I believe Marquardsen was on the Straight Side dealers' list one year. I won't say for sure about that. I think Simms has been on the dealers' list several years.

Q. Now Mr. Marquardsen owns and operates his own orchard property in Idaho, does he not?

(Deposition of C. H. Kinney.)

A. Yes.

Q. Now have John Hoover of Council, Idaho or Harry Heller of Filer, Idaho ever been jobbers or wholesale distributors for Cummer-Graham Company?

A. John Hoover has not, although I think possibly we have sold him some time in the past. Harry Heller has been I think always on the Straight Side Dealers' list but he is handled through Reilly-Atkinson as a sub-dealer of Reilly. [82]

Q. Was F. H. Hogue of Payette, Idaho a jobber or distributor for Cummer-Graham at any time?

A. Not to my knowledge.

Q. Now isn't it true that the Simms Fruit Ranch, Mr. Marquardsen, John Hoover, Harry Heller and F. H. Hogue were all growers as well as packers of fruit?

A. Yes, I think that's right. I think almost anyone who uses a carload of baskets in Idaho is such.

#### Cross-Examination

By Mr. Fisher:

Q. On your examination by Mr. Stewart reference was made to Straight Side Basket list. Please state what the Straight Side Basket List is.

A. In past years, prior to I think about June 1940—I might be wrong on the date—Straight Side Basket Corporation published a fair market price list and a list of accredited dealers in baskets who were entitled to a dealer's discount. Now if I have the date correct, about June 1940 or the time they cancelled their fair market price schedule, this list

(Deposition of C. H. Kinney.)

was abandoned and then the dealers and jobbers were designated according to the ——— as adopted by each individual factory.

Q. Did or did not Straight Side Basket Company require or attempt to require anyone using any machine belonging to it under a license to sell only to the dealers appearing on that list?

A. No. They allowed you to sell to anyone, but the dealer's discount could only be given to the dealers shown on that list.

Q. Did or did not the dealers' discount list referred to receive any consideration in the settlement between the Straight Side Basket Corporation and their licensees?

A. Yes, the payment of royalty was based on the delivered price of baskets and that delivered price was less to the listed dealers than it was to those not listed. [83]

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State of Texas  
County of Lamar

I hereby certify that the above and foregoing depositions of C. H. Kinney, A. V. Kinney and A. C. Mackin, were taken by me in shorthand and transcribed by me, and are true and correct, to the best of my ability.

Witness my hand and seal at Paris, Texas, on this the 27th day of February, 1942.

[Seal]                      H. M. SMITH

Notary Public in and for  
Lamar County, Tex. [84]

[Title of Court and Cause.]

### DEPOSITIONS

Depositions of Frederick C. Hogue, F. H. Hogue, Scott Brubaker, J. C. Palumbo, and R. H. DeHaven, witnesses on behalf of the plaintiff in the above entitled cause, taken before Frank J. Kester, a Notary Public in and for the State of Idaho, on Tuesday, March 17, 1942, commencing at the hour of 10:00 A. M., in the office of Frederick C. Hogue in Payette, Payette County, Idaho, pursuant to the attached stipulation of counsel.

#### Appearances:

For the Plaintiff:

RICHARDS & HAGA,

Attorneys-at-Law, of Boise, Idaho,

Appearing by and through

J. L. EBERLE, ESQ.

For the Defendant:

FREDERICK P. CRANSTON, ESQ.,

of Denver, Colorado; and

GEORGE DONART, ESQ.,

of Weiser, Idaho

Appearing by and through

GEORGE DONART, ESQ. [85]

Whereupon, at said time and place, and following some discussion and delay while waiting for witnesses, the following proceedings were had, to wit:

Morning Session

11:05 o'clock

Tuesday, March 17, 1942

FREDERICK C. HOGUE,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Will you state your name to the reporter?

A. Frederick C. Hogue.

Q. And quite often write your name as "F. C. Hogue"?

A. Yes.

Q. And what is your business, Mr. Hogue?

A. Merchandise broker.

Q. Handling what type of commodities?

A. Mostly shippers' supplies.

Q. Are you doing business with Cummer-Graham Company, a corporation, whose main office is in Paris, Texas?

A. Yes.

Q. How long have you been doing business with Cummer-Graham Company?

A. Oh, since about 1939.

Q. About what time in 1939?

A. Probably April, May.

Q. And what is the nature of that business, Mr. Hogue?

(Deposition of Frederick C. Hogue.)

A. Selling packages, fruit packages.

Q. Selling fruit packages for Cummer-Graham Company?

A. Well, I—they ship me packages, and I sell them. [86]

Q. (By Mr. Eberle) Now, do you have a territory in which you do this selling for them?

A. Well, it's mostly done in Idaho.

Q. You have no definite territory that's your selling territory?

A. No. No, I wouldn't say there was.

Q. And is there any limitation as to the type of packages that you handle for them?

A. No.

Q. Now, Mr. Hogue, just what is your procedure in handling their business, in reference to keeping a record of the business you handle for them?

A. Well, I sell these bushel baskets or half-bushel baskets and pea tubs, and they ship them up here, and I deliver them and invoice for them and collect for them.

Q. What record do you keep as to your transactions for Cummer-Graham Company?

A. Well, I keep a record on each car of packages.

Q. Well, now, what is the nature of that record? Is it a journal or a ledger sheet, or what is the nature of it?

A. I can't say that; I don't know.

Q. Well, have you a sample of how you keep that record, so we can see just what records or checks you keep of it?      A. Yes.



(Deposition of Frederick C. Hogue.)

Q. Have you got it handy here, so we can just see how you keep the record?

A. You mean just the car file?

Q. Well, what record you keep of your business with Cummer-Graham, just the mechanics.

(After some search through his files, [87] the witness produces a document and hands it to counsel.)

A. I don't know just what you want there.

Q. (By Mr. Eberle) Now, the only records you keep is a file on each sale? Is that your record?

A. Well, you see here is a car shipped to me, and they invoice that to me, and I sell the car and reinvoice it, and I pay them—like this letter here (indicating). See? That's where I paid for the car.

Q. In other words, you have a file on each car; is that it?      A. Yes.

Q. Showing the invoice, the bill of lading, and your correspondence?      A. Yes.

Q. All right. And you don't have any—you don't make any entries of these on your journal or ledger, so far as Cummer-Graham are concerned?

A. Well, I don't know about that. I don't know much about the book part of it.

The Witness: (to Mr. Brubaker) Do you?

Mr. Scott Brubaker: No.

The Witness: I guess we will have to get that from the bookkeeper.

Q. So far as you know now, you just keep a file

(Deposition of Frederick C. Hogue.)

on each car, showing your invoices, bill of lading, and correspondence?

A. In the file, yes; but getting back to the books, the part that would go in the books would be their invoicing us and our re-invoicing whoever they were sold to. [88]

Q. (By Mr. Eberle) That's what I was getting at. Have you got the books where those entries are made? A. Yes, I think so.

(After some search through his files, the witness produces a book, which he and counsel examine.)

Mr. Eberle: Perhaps we can save time by looking for that during the noon hour.

The Witness: Yeah. Anyway, copies of my invoice to whoever I sold it to would be in here.

Q. (By Mr. Eberle) Now, Mr. Hogue, you have an agreement, have you, with Cummer-Graham Company, as to your commissions in connection with these sales? A. Yes.

Q. Is the one, the agreement you now have, the same as the one you started with in 1939?

A. I believe it is.

Q. Have you that here, so we could see what the date of that is? A. Uh, huh.

(Witness makes some considerable search of his files and records.)

The Witness: I guess I will have to locate that during the noon hour.

(Deposition of Frederick C. Hogue.)

Q. Now, you think that that contract was made some time in '39, to start with?

A. Well, this last one—let's see, the last one would be—the last one would be '40, I believe.

Q. Oh, I see.

A. '40 to '41, '41 to '42. [89]

Q. (By Mr. Eberle) Did you have a contract, then, in '39?

A. One in '39 and one in '40. It would be just the two.

Q. You didn't make one in '41?

A. '39 to '40, and '40—I don't believe so.

Q. Will you check that, also, during the noon hour? A. Yes.

Q. Were these contracts signed here in Idaho?

A. Well, my part of it was signed here in Idaho.

Q. And with whom did you deal in negotiating for these contracts? A. Herbert Kinney.

Q. That's C. H. Kinney? A. Yes.

Q. Did he approach you, or did you approach him? A. You mean at the start?

Q. Yes, in 1939.

A. Well, I just couldn't say on that.

Q. But you negotiated with him——?

A. (Interposing) Yes.

Q. (continuing) ——about representing the company here in these sales? A. Yes.

Q. And did you discuss the terms of the contract with him? A. Yes.

Q. And so, likewise, with the other contracts?

(Deposition of Frederick C. Hogue.)

A. Yes.

Q. Now, when orders are sent in by you, Mr. Hogue, just what are the mechanics of that, or your practice in sending [90] the orders in? Do you have some form, or how do you do it?

A. Well, if I sell something, I will usually wire them to ship me so-and-so,—ship a car of baskets to Payette, or Fruitland.

Q. (By Mr. Eberle) Now, where your orders are not telegraphic, do you have any form of order that you send in to them?

A. Well, I could write a letter.

Q. Do you have any printed form that you use?

A. You mean an order book?

Q. Yes.           A. Yes.

Q. Now, could we see what those orders are like?

(After some search through his files, the witness produces a book and hands it to counsel.)

A. Here is one.

Q. Now, could I take one out of here as an exhibit, without ruining the book?           A. Yes.

Q. Would this one be all right, here (indicating)?           A. I think it would.

(Whereupon, a blank sales order from the witness' book was marked, "Plaintiff's Exhibit 1 for Identification.")

Q. Now, Mr. Hogue, handing you this Plaintiff's Exhibit 1 for Identification, I will ask you if that is the order blank that you mentioned?

(Deposition of Frederick C. Hogue.)

A. Well, this a Cummer-Graham order blank.

Q. Now, do you use that blank in sending in orders to Cummer-Graham? [91]

A. Some orders; not all orders.

Q. (By Mr. Eberle) But some of your orders are sent in on this blank marked Plaintiff's Exhibit 1? A. Yes.

Q. Now, Mr. Hogue, at the end of the year do you have a settlement with Cummer-Graham as to your commissions?

A. Well, when I sell a car of, say, baskets, they invoice me on the car of baskets and then when I have collected or even if I haven't collected it,—when I pay them for that car of baskets I deduct the commission I have earned, and then I pay them. So that's how it is taken care of; so there isn't any annual settlement; it rather takes care of itself.

Q. In other words, when you send the money in for merchandise invoiced to you on a certain invoice, you deduct the commission, do you, on a certain contract? A. Yes.

Q. Now, in selling these baskets, or taking orders, Mr. Hogue, does Cummer-Graham Company give you an approved list of people you can sell to?

A. No.

Q. How do you determine the credit of any of the purchasers or subdealers or growers?

A. Well, that's up to me.

Q. You don't have to inquire of Cummer-Graham as to the rating of any of these subdealers?

(Deposition of Frederick C. Hogue.)

A. No. If I sold someone and they didn't pay for it, I would be stuck.

Q. Do you talk the matter of credit over with Mr. Kinney? [92]

A. Oh, not in a detailed manner. I might ask him about someone, you know.

Q. (By Mr. Eberle) As to a person's credit?

A. I might.

Q. Now, during these years that you have been doing business with Cummer-Graham Company, Mr. Hogue, Mr. Kinney—C. H. Kinney would be out here in the summer or fall of each year?

A. He usually comes out at least once a year.

Q. And during the time that he would be in Idaho, just what would he do?

A. Well, I really don't know just what he does. He calls on me, and he—I suppose he calls on Reilly Atkinson.

Q. Does he call on any growers or any of the customers that buy these baskets?

A. Yes, he said he did.

Q. And he would go around the territory calling on these various growers and subdealers?

A. I don't know so much about the growers. He would call on dealers. The baskets are resold, usually, by the dealers to the growers.

Q. Would you accompany him on these calls?

A. Well, I have accompanied him, calling on dealers.

Q. But not in calling on growers?

(Deposition of Frederick C. Hogue.)

A. I don't believe I have accompanied him calling on growers.

Q. So if he would call on growers, he would do that by himself?      A. I believe so.

Q. So you would receive invoices for all of the sup- [93] plies you would order from Cummer-Graham Company?      A. Yes.

Q. (By Mr. Eberle) About what would be the volume of that business for the last three years, or for 1939, '40, and '41?

A. I couldn't hardly answer that without checking it.

Q. Have you the invoices covering the sales that you made during '39, '40, and '41?

A. Our own invoices?

Q. No, I mean the invoices that would be sent you by Cummer-Graham.

A. Yes, I believe I have.

Q. Have you a list of them, or have you the invoices themselves?

A. Well, the invoices would be in each car file, probably.

Q. And would those invoices be to you, F. C. Hogue?      A. Let's look one up.

(Witness examines some documents from his files.)

A. (continuing) Yes, F. C. Hogue. They will all be the same; they would be F. C. Hogue.

Q. In other words, as I understand you, all the invoices that you would get from the Cummer-Gra-

(Deposition of Frederick C. Hogue.)

ham Company would be made out to you, would be invoiced to you, F. C. Hogue?      A. Yes.

Q. Now, of course you haven't found your contract, but in order to save a little time, do you get any commission under these contracts on a certain type of baskets, even though sold in this territory direct by Cummer-Graham Company? [94]

A. No. I make a commission on what I sell myself.

Q. (By Mr. Eberle) That's all?      A. Yes.

Q. In other words, if Cummer-Graham Company, through Mr. Kinney, would make a sale to any grower or subdealer direct, and invoice it direct, you would get no commission on it?

A. That's right.

Q. Do you know how much Mr. Kinney sold to growers or subdealers that were invoiced to them directly and not to you, during the years 1939, 1940, and 1941?      A. No.

Q. Well, put it this way: Could you give us the names of some of the sales that were made direct by Cummer-Graham Company to growers?

A. No, I don't know of any.

Q. Did you ever talk to anyone about any of these sales that were made direct to a grower or subdealer?

A. No, I never have. In other words, you see there's another agent here, Reilly Atkinson, and anything that I didn't sell I would assume he sold. I wouldn't know for sure.



(Deposition of Frederick C. Hogue.)

Q. I mean where the invoices were made, as you mentioned, direct to the grower and not to you. Do you know of any of those instances?

A. Well, would that be direct to grower, or dealer, or anyone?

Q. Yes. Invoiced direct to them.

A. The only cases I know of is one, and that is where I sold some pea tubs—I believe that's the only one—pea tubs to P. G. Batt at Wilder, and the invoicing of those pea [95] tubs, of which there were three cars, was invoiced direct from Paris, Texas, to P. G. Batt.

Q. (By Mr. Eberle) And how, then, would you collect your commission on those?

A. (No answer).

Q. Or did you collect a commission on them?

A. Well, the commission—I believe the way that worked, they sent P. G. Batt the original invoice and sent us a copy with the same figures on it, and he paid those direct; and we figured the commissions on the three cars from the copy of the invoice, and deducted those on a payment to Cummer-Graham for some other material.

Q. Now, have you any—I was referring to some subdealers. Who are your subdealers in this territory?

A. Well, most all of the—. There would be Parsons, is a dealer, Parsons Fruit Company; F. H. Hogue; and Frank B. Arata; and J. C. Palumbo; J. C. Watson; Gem Fruit Union; Fruitland Fruit Co-Operative. Now, those are some of the dealers.

(Deposition of Frederick C. Hogue.)

Q. Did Cummer-Graham sell direct to any of those dealers?

A. No, they wouldn't sell direct, as far as I know. In other words, anything those dealers got they would either buy through me or Reilly Atkinson, I suppose. I don't know of any instance where they sold direct, that I know about.

Q. And these would be the dealers that C. H. Kinney would call on and work with, that you mentioned?

A. Yes, those would be some of the dealers that buy the things.

Q. Now, what would Mr. Kinney do with reference to col- [96] lections?

A. Well, in my own case I know that he looks to me. In other words, when they sell something—I might sell a hundred carloads of baskets, and they might not know where any of them went, but they look to me for the money.

Q. (By Mr. Eberle) And then would he do anything about doing any of the collecting from any of the persons that purchased any of these baskets?

A. He never has.

Q. So far as you know?                      A. No.

Q. Now, Mr. Hogue, reference has been made in some of these depositions to roller cars. I assume you understand what they mean by that?

A. Yes.

Q. Now, how would you handle the roller cars in Idaho?

(Deposition of Frederick C. Hogue.)

A. Well, roller cars are when the season gets strong here, Texas is quite a ways from the consuming point, and it takes seven to ten days to get them up here; and a lot of people don't like to obligate themselves to buy until they know they need them; so in the past they have usually put out some roller cars between Texas and here, have them coming, you see; and then if I needed three cars I would take those that are on track, if I needed them quickly, and if I didn't, I would order them out; and I think they were handled the same way by Reilly.

Q. In other words, if you needed one of these roller cars, you would get in touch with Kinney?

A. Yes.

Q. And then you would arrange with him for taking that [97] particular car, or those cars, that you wanted?

A. Yes.

Q. (By Mr. Eberle) As I understand your testimony, then, the purpose of these roller cars was that there were a number of these growers who didn't want to give orders or make purchases until they were ready for them?

A. Well, that would be my assumption of the reason.

Q. And the orders or sales wouldn't be made until after the roller cars were here?

A. Well, in transit here.

Q. And if the sale were, say, in Nampa, you would arrange with Mr. Kinney to use a certain number of those roller cars?

A. Yes.

(Deposition of Frederick C. Hogue.)

Q. Now, when would you be invoiced for the car, then? Assume that the roller cars were in Idaho, and you notified Mr. Kinney that you wanted one or more of those cars: When would they be invoiced to you?

A. Well, the first thing I would get would be the car number, and the contents, so I would know how to make my billing, and then they would be invoiced right after—direct from Texas, immediately upon the receipt of the information they got.

Q. Now, who would give them the information, you or Mr. Kinney, or both?

A. Well, Mr. Kinney, probably, if he was here.

Q. He would give them the information, and then they would invoice you? A. Yes.

Q. Would any of these roller cars be cars that you had [98] ordered on the basis of orders such as you have mentioned here?

A. How do you mean?

Mr. Eberle: Well, strike that question. We will try to rephrase it.

Q. (By Mr. Eberle) As I understand it, if you obtain orders from growers, you would order the merchandise from Cummer-Graham; is that correct? A. Yes.

Q. Now, the roller cars would not come in that class; is that true?

A. Well, that—that depends. In other words, I might have a stock of baskets here, and I would find that in two days' time maybe I could sell more

(Deposition of Frederick C. Hogue.)

than what my stock consisted of; so naturally the next thing I wanted to know was to find where I could find the nearest stock for immediate consumption; so naturally if I could find a car on the tracks that Reilly had ordered and found he didn't want, I would try to get that car to supply the difference.

Q. But when the car arrived here, it wasn't your property; you hadn't ordered the merchandise in that car, before its arrival?

A. It could be that way. It might be somebody else's car that I took. In other words, last year if Reilly had—oh, we would order, you see, and sometimes he would get in more than he could get rid of without getting on demurrage, and I might have use and take three or four of those; and the next week I might be a little heavy, and he would take them; so we kind of worked back and forth.

Q. Now, while it was on the track, it was a Cummer- [99] Graham car; is that true? And then when you, in order to save demurrage, would take it, then it would become your purchase; is that true?

A. Well, it would be correct unless that car was originally billed to me.—Of course you wouldn't figure that was a roller?

Q. (By Mr Eberle) Yes.

A. Yes, if I got hold of a car at Nampa, for example, it wouldn't belong to me until I had got the car and they had invoiced it to me.

Q. And in order to get it, you would probably take up with Mr. Kinney, if he was here, the matter

(Deposition of Frederick C. Hogue.)

of taking over that car, and he would notify Paris, and they would invoice it to you, and you would pay for it after you received the invoice; is that correct?      A. Yes.

Q. Now, reference is also made in some of these depositions to sight draft cars. Did you have any of those?

A. You mean last year, or since I——?

Q. Yes, during the time you were doing business with Cummer-Graham.

A. Yes, I have had sight draft cars.

Q. Now, how would you handle those?

A. Well,—well, I will just give you an example: I sold some pea tubs in Joseph, Oregon, and they weren't—they were invoiced to me. I made it sight draft, myself, because I was a little bit afraid of the fellow I was selling them to, and so I put a sight draft on them at Nampa, so they couldn't get past Nampa without paying it. They would bill a car to me, and I would divert it and sight draft right here. [100]

Q. (By Mr. Eberle) But you had no cases where there was a bill of lading sight draft directed to the grower?      A. No.

(Discussion of counsel, off the record.)

Mr. Donart: May I ask a few questions now?

Mr. Eberle: Yes, with the understanding that I can continue my direct examination.

Mr. Donant: Surely.

(Deposition of Frederick C. Hogue.)

Cross-Examination

By Mr. Donart:

Q. Now, just a few questions, Mr. Hogue: You stated that sometimes you would ask Mr. Kinney about different people's credit. Were you asking for information just like you would have made an inquiry anywhere else, or were you asking him because he was the representative of the company?

A. I was asking him just like I would ask anyone who might know. I might ask Brook Scanlon.

Q. It wasn't any agreement between you and Cummer-Graham that you must have the credit of your customer passed on before you can make the sale?

A. No, I stand my own credit.

Q. Now, as I understand, on all your deals with Cummer-Graham, anything that you sell to a grower or subdealer is charged to you by Cummer-Graham?

A. Everything has been charged to me by Cummer-Graham, outside of that one exception I mentioned.

Q. That one exception over at Parma?

A. At Wilder.

Q. And then if you sell anything out to someone and are unable to collect for it, does Cummer-Graham hold you for [101] their price on those goods?

A. Yes.

Q. (By Mr. Donart) Now, I want a little further information on these roller cars. As I un-

(Deposition of Frederick C. Hogue.)

derstand, those cars are sent out during the busiest part of the season; is that right?

A. That's right.

Q. And they are sent out for the purpose of taking care of the business of you and Reilly Atkinson and any other salesmen who handle Cummer-Graham products?

A. That's right.

Q. Now, how are they billed from Paris, Texas? Who are they billed to?

A. Well, that's hard to answer who they are all billed to, because naturally I don't know who they are all billed to.

Q. Well, the ones you have——?

A. (interposing) Well, there might be some that was billed to Reilly and he might not have needed them and I needed them quick, and so we diverted them to me and they charged me and credited Reilly. On the other hand, the next week I might have some cars and I found out I didn't need them, and Reilly was dying to have them, and so we would divert them to Reilly, and he would be charged and I would be credited.

Q. When they ship those roller cars, do they bill them to one of the men in this——?

A. (interposing) Well, those aren't sight draft cars.

Q. Well, I don't mean sight draft cars; roller cars.

A. Yes.

Q. Do they bill them to one of the men in this state or this adjacent territory who handles their products?



(Deposition of Frederick C. Hogue.)

A. Well, as far as I know, the ones that have been [102] billed to me have, of course.

Q. (By Mr. Donart) Well, putting it this way: You don't know of any where they roll them out billed to Cummer-Graham at Nampa, Idaho, or some such place as that?

A. Well, that's a little hard to answer. I believe, though, that they would have to have someone's name connected with that billing, in order to look after them; otherwise, they would set and none of us would know about them, to take care of them.

Q. And on these sight draft cars, as I understand your testimony, on all of those you had anything to do with you were the one who drew the sight draft on the man you sold it to?

A. Yes, that's right.

Q. Just summarizing, as I understand your deal with Cummer-Graham, you handle their products out here? A. Yes.

Q. And you order the stuff from them, and they charged them to you? A. That's right.

Q. You sell them out and you charge to your customer. And Cummer-Graham holds you responsible for their purchase price, whether you collect from the customer or not? A. That's right.

Mr. Donart: That's all.

Mr. Eberle: All right. Supposing we come back at one, then?

Mr. Donart: All right.

Mr. Eberle: And if you can find that contract—.

(Deposition of Frederick C. Hogue.)

The Witness: Yes, I will come back here early. [103]

(Whereupon, at 12:05 P.M. of said day, the noon recess was taken.)

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Afternoon Session

1:00 o'clock

Tuesday, March 17, 1942

FREDERICK C. HOGUE,

recalled as witness on behalf of the plaintiff, and having been previously duly sworn, testified as follows, upon further

Direct Examination

By Mr. Eberle:

Q. Mr. Hogue, have you found your contract with Cummer-Graham Company? A. No.

Q. Before we close the deposition, will you make another search for it? A. Yes.

Q. Now, Mr. Hogue, with reference to the roller cars that were mentioned, these roller cars as I understood your testimony were not shipped in on any prior sale? A. (No answer).

Q. Prior sale of the merchandise or the supplies contained in the cars.

A. Well, they might be applied on one.

Q. Well, I thought you said in your testimony this morning that some of these growers didn't

(Deposition of Frederick C. Hogue.)

want to make their purchases until later in the season, and that the Cummer-Graham Company would have these roller cars coming in here so that these growers could purchase them; is that true?

A. Yes.

Q. So in those cases there would be no prior sales?

A. No, until you sold it and got it. [104]

Q. (By Mr. Eberle) Now, you say these were charged to you. Does that have reference to these invoices? A. Yes.

Q. In other words, you mean they were invoiced to you, and you consider that your charge?

A. Yes.

Q. Now, are these roller cars invoiced to you before you advise Mr. Kinney that you want the cars?

A. No, if they had some cars on track and I wanted one, they wouldn't invoice it until I had taken it.

Q. That's it. In other words, if Cummer-Graham Company had these roller cars on the tracks in Idaho, you wouldn't be invoiced or charged until you advised Mr. Kinney or some other representative of the company that you wanted the car; is that true?

A. Well, yes. On the other hand, if I had, say, six cars coming in and they were billed to me, and Reilly wanted a car, I would probably give him a car,—or vice versa.

Q. But those would be cars that you had ordered?

(Deposition of Frederick C. Hogue.)

A. Well, in other words, what I might do is tell them to ship me five or ten cars, see? And they would ship those in to me, and if when they got here, if I found out I couldn't get rid of the ten, I would probably find out if Reilly couldn't take some of them, to get them off of the track.

Q. Well, but there are some roller cars come in—and that was the practice of Cummer-Graham Company—in Idaho that would be available in the event you needed them?

A. Well, lots of times there might be cars going into Washington that, if we were in a hurry, we could get them.

Q. But they would also have cars in Idaho, so that if [105] you wanted them they would be available for you?

A. Well, the past year I don't—I believe that every roller car was—it was in a way a roller car, but I believe it was billed to either Reilly or myself, although we might not have a particular order for it.

Q. (By Mr. Eberle) All right, do you have any invoice for a roller car that was billed to you before you ordered a car?

A. That was billed to me before I ordered it?

Q. Yes.           A. No.

Q. In other words, there would be no invoice no billing to you on these roller cars unless you diverted it or ordered the car?

A. That's right.

(Deposition of Frederick C. Hogue.)

Q. So as to these roller cars, they were Cummer-Graham Company property until you directed Mr. Kinney or someone to divert it to you, or you wanted it, in which event it would be invoiced to you; is that right?      A. That's right.

Q. Now, you said Mr. Palumbo was a dealer. Did you sell Mr. Palumbo his cars of supplies from Cummer-Graham Company in 1940, or did he buy those direct?

A. I don't think Palumbo bought anything from Cummer-Graham in 1940. He is a dealer as far as any manufacturer is concerned.

Q. All right, will you check your invoices and see if you have any invoices covering any shipments from Cummer-Graham to Palumbo in 1940?

A. I can, yes. [106]

Q. (By Mr. Eberle) Will it take you very long to do that?      A. 1940?

Q. September, I think, is when he got some of these cars.

(Witness makes a considerable search of his files.)

A. I will have to check that, but I don't believe I sold Palumbo anything in 1940.

Q. Well, now, do your books show any commissions received on account of a sale to Mr. Palumbo in 1940?

A. They wouldn't if I hadn't sold him anything. How would it be if I looked that up afterwards?

Q. All right. Will you look that up, if you

(Deposition of Frederick C. Hogue.)

want to, and we will check that. Or, have you got your journals and ledgers, you could bring down here, and we could check it together? It wouldn't take more than a minute, would it?

A. Yes, we can check that.

(Witness leaves office and returns with book-keeper, and a search is made of the files and records.)

A. No, there isn't any for 1940. I didn't think there was.

Q. How do you carry your Cummer-Graham account? Is that a ledger account?—as long as you have got the books here.

A. Yes, ledger account.

Q. There isn't any account for Palumbo?

A. No.

Q. Now, Mr. Hogue, under your contract, if you or Mr. [107] Kinney sold Mr. Palumbo any cars, whether they were roller cars diverted from Nampa or cars shipped on order, would Cummer-Graham owe you a commission on these sales?

A. The only way they would owe me a commission on any sales would be if I went over here and sold Palumbo myself.

Q. (By Mr. Eberle) And if Kinney sold Palumbo, then Cummer-Graham would owe you no commission? A. That's correct.

Q. Now, Mr. Hogue, in your answer as garnishee in this case you stated that you had on hand certain baskets, tubs, or hampers of Cummer-Gra-

(Deposition of Frederick C. Hogue.)

ham Company. Now, how did you get possession of those?

A. Well, they were shipped to me.

Q. Well, now, would that be the carry-over from one season to another?

A. Well, yes, that could be.

Q. Well, now, just explain how you would carry over baskets from one season to another for Cummer-Graham Company.

A. Well, you see they ship the merchandise to me on consignment, and so my picture in the thing is that I either have to have the money or the inventory, one or the two.

Q. Oh, I see. In other words, your contract is one whereby they ship the baskets to you on your order and you sell them on a commission, and you either have to return the baskets or the money; is that true?

A. Either have the baskets or the money; that's correct.

Q. And then at the end of the season, any baskets which you have ordered which haven't been sold, you store for and on behalf of the Cummer-Graham Company?

A. No, I store them, you might say, for myself. In [108] other words, as I see it, I would say that the inventory was collateral to Cummer-Graham Company, but I insure it and pay the storage on it.

Q. (By Mr. Eberle) Well——?

A. I don't know just what you mean there.

(Deposition of Frederick C. Hogue.)

Q. You say that your contract provides in the first instance that this stock or these baskets are consigned to you, and you either have to turn the money over to them or the baskets or merchandise?

A. Yes.

Q. Well, that situation doesn't change during the year; at the end of the year the baskets are still Cummer-Graham's; is that true?

A. (No answer).

Q. The unsold baskets are still Cummer-Graham's baskets; is that correct?

A. Well, I don't know whether they would be Cummer's or not. We are charged with them, and we pay the storage on them; but if I were to die or anything, they could come in and get them.

Q. In other words, the baskets belong to them, if you don't sell them?           A. Yes.

Q. Now, those baskets are invoiced to you at a certain price when you order them?           A. Yes.

Q. Is that price fixed at the beginning of the year?

A. Well, they usually—yes, they usually come out with their price list at the first of the year.

Q. Now, when you carry over into a second year a stock [109] of the baskets such as you mention in your answer as garnishee, and they send you a price list at which to sell those baskets the next year, is that price identical with the year before?

A. Well, in this particular case, it so happened that of the stock I had on hand I haven't yet had



(Deposition of Frederick C. Hogue.)

reason to sell them; but I would imagine that when I do sell them, I will sell them at the new price.

Q. (By Mr. Eberle) Now, you have been invoiced once for those baskets?

A. Yes.

Q. And then you store them for the winter for Cummer-Graham, and then when spring comes Cummer-Graham will put a new price on those baskets?

A. Well, I am believing they will. They haven't, yet.

Q. And the price will fluctuate from year to year?

A. Yes.

Q. And then how are those invoices adjusted from the prior year, to the new price?

A. I couldn't tell you that; we haven't had it, yet.

Q. Well, in prior years how was the price adjusted?

A. I have never had any carry-over of the bushels and half-bushels; and the pea tubs and pea hampers, which are these (indicating), have been carried over for two years. In other words, I have never sold any of that piece of inventory there, so I don't know just——. I would suppose they would just send me a price list, and if and when I could sell some of these, I would sell them at the new price list, from which they would benefit.

Q. Then how would you adjust your books so far as the invoice price was concerned when these baskets were originally [110] invoiced to you?

(Deposition of Frederick C. Hogue.)

A. I just don't know.

Q. (By Mr. Eberle) Now, take these tubs and hampers, Mr. Hogue, mentioned in this answer of garnishee, which you say you have held in storage here for two years: Have you paid the storage and insurance on those for the two years? A. Yes.

Q. Now, how are you going to get that money back that you have expended for storage and insurance on these Cummer-Graham hampers and tubs?

A. Well, I guess you don't get it back; it's what you have to pay out of the commissions that you have received.

Q. Well, but you haven't received any commissions on these tubs, have you?

A. Not yet, no, but you see, what I have—I have, it would be a blanket policy, and I carry the insurance, and we will say maybe that policy costs a hundred dollars a year, deposit; and I will cover all the bushels and half-bushels that come in and are sold and are gone, but this blanket policy covers these; and I don't get anything back, but I pay that out of what I may have earned—it's just a cost, you might say.

Q. So that the price changes on these supplies are not material, in view of the fact that you just get a commission on the sale; is that true?

A. How do you mean, "not material"?

Q. Well, the price changes during the time that you have them in your possession for Cummer-Graham; is that true?

(Deposition of Frederick C. Hogue.)

A. It could change, yes.

Q. Yes, and if the price changes, that doesn't affect [111] you excepting that you cannot sell them excepting at the new price; is that true?

A. Yes.

Q. (By Mr. Eberle) And when you do sell them, the invoice to you means nothing—the old invoice means nothing, because you merely sell on a commission; is that true?

A. Yes, I think that would be right.

Q. So that, as I understand your testimony, then, these baskets that you get and these supplies you order from Cummer-Graham and are invoiced to you, are really not your baskets?

A. Well, I don't know. What do you mean by that? It's kind of a technical thing, I would say. They are mine, and yet they could come in and take them, sure as the world, if I was in default or something.

Q. Do I understand your testimony to be that they could change the price on your baskets?

A. Well, if they brought out a new price list; most anything anyone handles, you sell at the new price list.

Q. Well, let me put it this way, Mr. Hogue: If you actually bought these baskets at the price according to that invoice, do I understand that they could later increase that price?

A. Well, I really don't know. They would send me a price list to resell at, but whether they would

(Deposition of Frederick C. Hogue.)

raise my cost—that's what you mean, I guess—I don't know, because it hasn't come up.

Q. Well, I thought you said, Mr. Hogue, that as to some of these supplies it did occur in prior years—not as to hampers and tubs, but as to some other supplies—the [112] price was changed in the spring.

A. Well, just for example, if I was invoiced with bushel baskets at, say, a dollar and a half a dozen, and you were selling at that price and buying at that price; and along in the fall they might raise to a dollar and sixty-five, and I would be selling at that price and buying at that price.

Q. (By Mr. Eberle) But it would be the same baskets they had been invoicing to you at a dollar fifty?

A. I see what you mean, but I can't remember of any place where I have had a carry-over of baskets that had been invoiced to me.

Q. Well, I don't mean just baskets, but any supplies.

A. No, no baskets or hampers or tubs.

Q. Or anything else?           A. No.

Q. Has the price changed on any of this merchandise in the last three years?           A. Yes.

. Has it changed between the time it was invoiced to you and the time that you sold it?

A. I can't think of any time that it has been, outside of this carry-over I have got now, which is invoiced to me at a certain price; and like I say,

(Deposition of Frederick C. Hogue.)

I haven't sold any of it, but I haven't had any re-invoice or anything that would raise the price.

Q. But under your contract they can raise the price on that?

A. I don't know whether they can or not.

Q. Probably we had better defer that until we get the contract. Now, do you receive a commission on all baskets of [113] a certain type sold in this territory, or only on your sales?

A. Only on my sales.

Q. (By Mr. Eberle) In other words, you get no commission on the baskets that Mr. Kinney sells to growers or dealers?

A. No.

Q. Now, during the last three years were there any roller cars that were not diverted or sold, that were placed in storage?

A. The last three years? No, there was none that I know of.

Q. Is there anything in your contract that, if roller cars are not sold or diverted, that you are to store them?

A. Well, we had better hold that up, too.

Q. All right. Now, where you had baskets in stock, unsold, at the end of the season, what do you do with reference to inquiring of Cummer-Graham Company what to do with those baskets?

A. Well, we have warehouses that we store the baskets in, and at the end of the season we just check our inventory; and we don't ask them what to do with them; there is nothing to do with them but store them, until the next season.

(Deposition of Frederick C. Hogue.)

Q. When you don't sell them, do you advise them as to the inventory, or do they inquire of you as to the inventory?

A. We tell them what we have that's unsold.

Q. And what do they do, then, with respect to that inventory you send them?

A. Well, that just goes back to the total amount of the shipments they have sent up here, should equal what we have on hand plus the cash we have sent them. [114]

Q. (By Mr. Eberle) Now, I noticed in this one file here you have, "Wired Kinney." Is that in reference to a diversion of a car?

A. Here is the diversion of the car; it was shipped to myself at Fruitland, and I diverted it to Emmett. Now, this was evidently the wire I wired when I ordered the car.

Q. You wired Kinney when you ordered the car?

A. I believe that's what I did here, either Kinney or whoever had them.

Q. Then, if Kinney was in the state of Idaho, you would advise him about diverting any of these roller cars?

A. Well, usually if he was here, if I needed a car, I would get hold of Herbert and he would contact Reilly or someone and try to find me one.

Q. Herbert is C. H. Kinney? A. Yes.

Q. You would either get in touch with Mr. Kinney or——?

A. If it was a car that wasn't billed to me, I wouldn't divert it without authority.

(Deposition of Frederick C. Hogue.)

Q. Without authority from Mr. Kinney?

A. Yes, Mr. Kinney, or Reilly, whoever it was going to.

Q. Well, you are going to check up and see if you have any invoices on those roller cars?

A. Yes.

Mr. Eberle: If you want to examine a little more, we will go on some more in a little while.

Cross-Examination  
(Additional)

By Mr. Donart:

Q. As I understood your testimony, the only way a roller car differs from any other car is that it is a car sent [115] out here, either invoiced to you or to Reilly or somebody else in this territory, and instead of the one it's invoiced to being the one who finally receives it, why with the consent of the man it is invoiced to it is switched over to either you or to some other dealer?      A. Yes.

Q. (By Mr. Donart) In other words, all of these roller cars are invoiced by Cummer-Graham to one of their brokers or factors or whatever you are called, here in this state?

A. As far as I know, that would have to be the way.

Q. That's what I am getting at: You don't know of any instance or any practice they have of just starting roller cars out invoiced to Cummer-Graham, and then transferred to you people as and when you

(Deposition of Frederick C. Hogue.)

called for them; you don't know of any practice of that kind?

A. Well, I don't because I think it would have to have somebody on there to notify.

Q. That's what I was getting at. Now, as regards your answer to the garnishment, and this carry-over: As I understand, you have a carry-over now of some of the materials that were invoiced to you by Cummer-Graham; is that right?

A. That's right.

Q. And the only communication you have from Cummer-Graham which would support a bookkeeping entry is that invoice that's been sent to you?

A. Uh, huh.

Q. They were invoiced to you at a certain price?

A. (No answer).

Q. That's right? A. That's right. [116]

Q. (By Mr. Donart) And when you get ready to sell them out, you will be given a new sale price; if the sale price changes? A. Yes.

Q. But you don't know whether the price at which they are invoiced to you, as between you and Cummer-Graham, will be changed? A. No.

Q. You don't know whether you pay for them at the present price, present invoice price or whether Cummer-Graham may change that? A. Yes.

Q. As I understand, you have never had any instance where they ever have changed it?

A. No.

Q. You have always settled on the original invoice price; if the price goes up, you make a profit?



(Deposition of Frederick C. Hogue.)

A. (No answer).

Q. If the price goes up, and you are directed to sell them at a higher retail price?

A. Well, as a rule this changes so fast I hardly know of it changing in the middle of a deal.

Q. I mean, if they advanced the price of the stuff you are carrying now, as far as you know you will make that much more profit?      A. Yes.

Q. And that will take up some of the expense of yours for storage and insurance?      A. Yes.

Q. So, as I understand the arrangement, they ship this [117] stuff out here to you, and charge you the invoice price at the time they ship it?

A. That's right.

Q. (By Mr. Donart) And the date of payment is fixed by the time when you sell the stuff—when you resell?      A. That's right.

Q. In other words, they are not to bill you for the invoice price until after you have sold it?

A. Yes.

Q. And whenever you have sold it, whether it's on cash or credit, then you owe the invoice price?

A. That's right.

Mr. Donart: That's all.

### Redirect Examination

By Mr. Eberle:

Q. Well, Mr. Hogue, I thought you said you had paid the insurance and storage out of your commissions?

(Deposition of Frederick C. Hogue.)

A. Well, that's one place where I get the money to pay it from, yes.

Q. Well, do you ever make more than your commissions on these sales?

A. Well, I do if these hampers and tubs are billed to me at one price, which they are now, but at the time I sold them I sold them at a higher price, I would make a commission and I would also make an extra profit.

Q. Yes, but if they raise the price to you, you wouldn't. Your commission is based on the sale price, isn't it?

A. Well, here is a part of an answer to that: Now, these—let's see—I think these hampers were invoiced to [118] me at fifteen cents two years ago, and if I sold those for fifteen cents I would make a commission; but if I sold them at sixteen, I would make a commission and an extra profit.

Q. (By Mr. Eberle) But I thought you said they would fix the price to you next spring?

A. Well, they will probably give me a price to sell them for, but whether they will raise it up or not, I don't know.

Q. But suppose they raise it up?

A. Well, then I would have a commission instead of a commission and a profit.

Q. So you would just have a commission, if they raise the price to you?           A. Yes.

Q. And so that you would still have to get your storage and insurance out of your commission?

A. Yes.

(Deposition of Frederick C. Hogue.)

Recross Examination

By Mr. Donart:

Q. Well, now, this commission: You can call it either a commission or profit, can't you?

A. It can be either way, because——

Q. In other words, what it amounts to is this: They charge them to you at one price, and you sell them at a different price, and the difference between the price you buy them for and the price you sell them for is what you make?

A. Yes, that's right.

Q. You can call it either commission or profit, can you not?

A. Yes. [119]

Mr. Donart: That's all.

Redirect Examination

By Mr. Eberle:

Q. Have they raised the price on baskets during any of these years, during the season?

A. I don't know of any time they have, during actual season.

Q. Have they raised the price from one season to the next?

A. Yes.

Q. Well, now, then, where there was a carry-over, and they raised the price, would you then settle on the basis of the new price?

A. Well, I never had that instance come up; I never had the carry-over.

Q. Now, what does your contract say about your commission being based on the gross sale price?

(Deposition of Frederick C. Hogue.)

A. The gross sale price——. Well, your commission is based on the selling price less the freight.

Q. Selling price, less the freight. Who pays the freight?      A. The consumer.

Q. All right, now, what does that commission amount to?      A. Seven per cent.

Q. In other words, your contract is that you get seven per cent of the selling price less freight. That's when you sold to a grower?

A. To a dealer.

Q. All right, now, that's to a dealer. Now, if you sold to a grower, what would be your commission? [120]

Mr. Donart: Just a minute. Don't you think that's being a little inquisitive about a man's business?

(Discussion of counsel, off the record).

Mr. Eberle: I will withdraw that.

Q. (By Mr. Eberle) If you sold to a grower, it would be more than seven per cent?

A. Well, I don't believe I sell any growers, is what I was thinking of.

Q. But under your contract you would have a higher per cent for growers than for dealers?

A. You wouldn't, according to last year. I believe the carload price was the same to anyone who could buy it.

Q. All right, under your contract with Cummer-Graham, the only compensation you receive for all your service is this seven per cent on the selling price less freight; isn't that true?      A. Yes.

(Deposition of Frederick C. Hogue.)

Q. Regardless of what the selling price or invoice may be? A. Yes, I think that's right.

Mr. Eberle: That's all.

Recross Examination

By Mr. Donart:

Q. Well, do you know whether that will be the arrangement if this stuff is marked up, or do you know whether you will still settle with them on the basis of the invoice price on which it is charged to you on the books at this time?

A. I don't know.

Mr. Donart: That's all. [121]

Redirect Examination

By Mr. Eberle:

Q. Well, unless you make a new contract, if this contract covers next year, you will still get only a commission, won't you?

A. Well, you would get more than a commission if the price was not raised.

Q. Well, now, in other words, if they would increase your commission; but I mean under your present contract, it only provides for a seven per cent commission on the sale price less freight; isn't that right? A. I think that's right.

Mr. Eberle: That's all.

Recross Examination

By Mr. Donart:

Q. Now, putting that another way, isn't all that

(Deposition of Frederick C. Hogue.)

amounts to this: They invoice them to you at a price which is seven per cent less than the price at which you sell them?      A. That's right.

Q. What it amounts to is they invoice them to you at a price seven per cent below that for which you sell them?      A. Yes.

Mr. Donart: That's all.

#### Redirect Examination

By Mr. Eberle:

Q. And that would be true regardless of what the sale price was?      A. Yes, I think it would.

Q. Yes. So if they were increased or lowered, the sale price, your seven per cent would still be on the sale [122] price less freight?      A. Yes.

Mr. Eberle: That's all.

#### Recross Examination

By Mr. Donart:

Q. Well, now, do you know whether—say they raised the price on the ones you have now, do you know what your settlement will be with Cummer-Graham, whether you will still settle with them at the price at which they are charged to you now, or whether you would settle with them at an increased price?

A. On the inventory I have now?

Q. Yes.

A. No, I don't know, because it's never happened.

(Deposition of Frederick C. Hogue.)

Redirect Examination

By Mr. Eberle:

Q. When will you know?

A. When the season comes, I will ask them.

Q. And when the season comes you will ask them what you are supposed to pay for these baskets and what you are supposed to sell them for?

A. I would ask them what I am supposed to sell them for.

Q. And what would they do, invoice them to you at seven per cent less than the price you are supposed to sell them for?

Mr. Donart: Just a minute. I object to that. The witness has stated he doesn't know.

Mr. Eberle: All right, if you will check those invoices on the roller cars, and that contract, [123] we might ask Mr. Hogue, Senior, some questions.

Is that agreeable to you, George?

Mr. Donart: Yes, that's all right.

(Witness excused). [124]

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F. H. HOGUE

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Your name?                   A. F. H. Hogue.

Q. Mr. Hogue, you live in Payette?

(Deposition of F. H. Hogue.)

A. I do.

Q. And what is your business?

A. Fruit and produce.

Q. And you own and operate orchards?

A. Yes, sir.

Q. How long have you owned and operated orchards?

A. Oh, I would say about twenty-five years.

Q. And you are also engaged in packing fruit for those orchards?      A. Yes, sir.

Q. Now, how long have you been engaged in the packing of fruit from those orchards?

A. Thirty years. —From these orchards, you mean?

Q. Yes.      A. The same time.

Q. And from whom did you buy those supplies in the last four or five years?

A. Well, we bought from the Basket Sales, up to two years ago, and then we bought through Frederick's, from there on out.

Q. And "Frederick's" is F. C. Hogue?

A. That's right. [125]

Q. (By Mr. Eberle) Now, during those years did you buy for your own orchards as well as for other orchards, or just for your own orchards?

A. We bought wherever we could sell.

Q. So you were engaged as a dealer for others, as well as for supplies for your own orchards?

A. Yes, that's our business. We don't buy from just one party, you know; we buy from different people.



(Deposition of F. H. Hogue.)

Q. Now, were you a retail dealer for Cummer-Graham in 1939?

A. No, sir, we wasn't.

Q. During what years were you a retail dealer for Cummer-Graham?

A. We never was a retail dealer for Cummer-Graham; when we did business for Cummer-Graham, we bought them outright. And I think that was '38, was the last year we did any business. I would have to check up for sure.

Q. Now, in connection with the supplies, baskets, tubs, and so forth, that you purchased for use as a grower in your own orchards, did you buy those at a discount?

A. Well, at that time all basket sales carried a discount. We didn't endeavor to keep them separate, what we used or what we sold; but in those days it was rutable to get a discount.

Q. In other words, you got a discount on what you bought, whether you told them it was for your own use or to sell to someone else?

A. Well, we buy outright; we don't have to tell them anything; we buy outright and do whatever we want with them, and the discount is the same. [126]

Q. (By Mr. Eberle) And your dealer discount would apply, whether you sold them to someone else or whether you used them at your own orchards?

A. That's right.

Q. And you did? A. Yes.

(Deposition of F. H. Hogue.)

(Whereupon, a "Certificate of Retail Dealer" signed by the witness and dated July 12, 1939, was marked, "Plaintiff's Exhibit 2 for Identification.")

Q. Mr. Hogue, handing you Exhibit 2 for Identification, I will ask you if the "F. H. Hogue" appearing thereon is your signature.

A. Yes, that's my signature.

Mr. Eberle: I now offer that in evidence.

The Witness: Well, it looks like this was '39. I think I told you '38. If it's '39, that's what it is.

Q. Now, Mr. Hogue, did you owe Cummer-Graham anything during—at any time during 1939, 1940, or 1941?      A. Yes, I did.

Q. Now, when did you owe them?

A. Well, I can't tell you that. We owed them all through those years. I can't tell you that. That's a matter of book record. —Let me see. (Witness examines records). No, we didn't owe Cummer-Graham; we owed the Basket Sales, not Cummer-Graham.

Q. Basket Sales was a sales agency handling Cummer-Graham baskets?

A. Well, everybody's baskets. —Not everybody's baskets, but they handled eight or ten mills. We didn't know [127] whose baskets we would get. We didn't have any choice; they gave us whatever they wanted to. We took them.

Q. (By Mr. Eberle) Did you ever use or sell any baskets during those years, owned by J. A. McGill of Paris, Texas?

(Deposition of F. H. Hogue.)

A. I don't recall any coming that way.

Q. Well, now, how did you carry the account, with reference to baskets, that you received during those years, manufactured by Cummer-Graham Company?

A. Well, we carried it all under the Basket Sales. We didn't try to identify the different mills at all.

Q. You simply carried the name of the sales agency?

A. That's all.

Q. Now, did you make a trust agreement or assignment for the benefit of your creditors, in those years?

A. Yes.

Q. When was that?

A. I think that was the 14th of February, a year ago; that would be one year the fourteenth of February.

Q. Now, have you a list of those creditors, or has Mr. Brubaker got that?

A. Well, Mr. Brubaker is the trustee; he would have that.

Q. Was it an assignment or a trust agreement?

A. Trust.

Q. And he would have a copy of that, I suppose, too. Now, who made the arrangements with you for that trust agreement?

A. Oh, Mr. Donart here, I think, handled the papers on it.

Q. I mean in negotiations with the creditors, did you [128] talk to anyone about it?

(Deposition of F. H. Hogue.)

A. No, we didn't have a creditors' meeting.

Q. (By Mr. Eberle) Who did you talk to about it?

A. I talked to my attorney about it.

Q. That's the only one?

A. No, but he was one of them. And I talked to the bank. You have to talk to the bank, you know.

Q. Did you talk to Mr. McGill?

A. We talked to his representative.

Q. What's his name?

A. DeShong; he was here.

Q. And who else did you talk to about it? Any other representatives? Mr. Kinney?

A. Well, I talked to Mr. Kinney. I talked to his father, who was the trustee.

Q. That's A. N. Kinney?

A. No, I think it's C. H. and C. N.

Q. Now, for instance, what did you discuss with C. H. Kinney about it?

A. Well, I don't remember just what was discussed, except this, that we couldn't pay them; that was the main discussion, and that I thought the best thing to do was to let somebody else handle it; and that's what we did do.

Q. Have you a list of those creditors?

A. Oh, no, I turned it all over to the trustees; I haven't any list of them. I know some of them, but I haven't any accurate list I could give you.

Q. What would be the amount of the item C. H. Kinney discussed with you?

(Deposition of F. H. Hogue.)

A. Basket Sales. [129]

Q. (By Mr. Eberle) What would be the amount of that item?

A. That would be up at thirty thousand, maybe a little more. That would be the Basket Sales Company. He represented that.

Q. Now, prior to that time, along in February, 1939, did you make a mortgage to Mr. McGill?

A. I think that was the month.

Q. Now, was that the same property that was included in the trust agreement, that was included in the mortgage?      A. Yes.

Q. The mortgage was made in 1938 wasn't it?

A. Yes, that's right.

Q. Well, the mortgage which we found recorded in Book 13 of Mortgages at page 575, Records of Payette County, is dated February 10, 1939, Mr. Hogue.

A. That's all right; that's when it was; that must have been two years before this happened.

Q. Now, that was two years before the trust agreement?      A. That's right.

Q. Is the property described in that mortgage the same as that described in the trust agreement?

A. It should be; it was the same property.

Q. Was that mortgage satisfied or what is the status of that mortgage?

A. It's on record yet, not satisfied.

Q. And the trust agreement was subject to that mortgage?      A. It must have been.

(Deposition of F. H. Hogue.)

Q. Now, this note in the mortgage referred to as [130] \$33,694.00: Was that for baskets purchased? A. All baskets, yes.

Q. (By Mr. Eberle) And purchased through the sales agency of Basket Sales Company?

A. That's right.

Q. Now, when C. H. Kinney took his father back to Denver in October of '41, he came back after that, didn't he, Mr. Hogue?

A. Yes, he did.

Q. And then what did he do with reference to the orchards there, when he came back?

A. Well, I think he went away twice. I have got to kind of think about that a little bit. But I know that the orchards were leased by the trustee; I know that; I don't remember just what trips he made.

Q. And he kind of looked after them there?

A. He did.

Q. And did you buy the fruit from those same orchards in 1941? A. No, sir.

Q. Who was the fruit sold to, in 1941?

A. We sold them, but we didn't buy them. We sold to anybody we could, you know, regular trade; but we didn't purchase them.

Q. And who did you consult with reference to those sales?

A. We didn't consult anybody; we were turned loose on it, to do the best we could, and we didn't ask anybody, and we weren't disturbed.

(Deposition of F. H. Hogue.)

Mr. Donart: Is that all? [131]

Mr. Eberle: Yes.

Mr. Donart: No cross-examination.

(Witness excused). [132]

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SCOTT BRUBAKER,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. State your name, Mr. Brubaker.

A. Scott Brubaker.

Q. And you live in Payette?

A. Yes, sir.

Q. Mr. Brubaker, are you acting as trustee for creditors in connection with some orchard property in Payette County?

A. Well, yes, but it includes other properties.

Q. I see. Other properties in addition to orchards?

A. Yes, sir.

Q. Have you the petition and order pursuant to which you were appointed?

A. Yes.

Q. Can I see that?

(Witness leaves office and returns with certain documents).

A. I have a copy here. Of course it's a matter of record in the Clerk's office.

(Deposition of Scott Brubaker.)

Q. Yes, I know.

(Discussion of counsel and witness, off the record).

(Whereupon, a copy of Order Appointing Trustee, dated January 14, 1942, was marked, "Plaintiff's Exhibit 3 for Identification.")

Q. Handing you Exhibit number 3, Mr. Brubaker, I will [133] ask you if that's the copy of the order appointing you trustee.

A. Yes, sir.

Mr. Eberle: I will now offer that in evidence.

Q. (By Mr. Eberle) Now, who was the petition signed by, pursuant to which this order was issued?

A. Well, if I recall correctly, it was the First Security Bank, F. H. Hogue, and J. A. McGill.

Q. And who signed for J. A. McGill?

A. I can't be sure of that. I can't recall.

Q. C. H. Kinney, agent?

A. Well,——

Q. Or do you know what the petition shows?

A. Well, I have seen the petition, but I can't recall just who did sign for J. A. McGill.

Mr. Eberle: There would be no objection to our getting a certified copy of that petition——?

Mr. Donart: (Interposing) Why, there is no objection to your getting a certified copy of anything that's of record in the court house.

Q. (By Mr. Eberle) But you have no copy of the petition? A. No.



(Deposition of Scott Brubaker.)

Q. Have you a copy of the trust agreement?

A. Yes, sir.

Q. May I see that?

A. (Producing document) That seems to be an original, George.

(Discussion of counsel, off the record).

Q. (By Mr. Eberle) Now, Mr. Brubaker, handing you Plaintiff's Exhibit number 4 for Identification, I will ask [134] you if that's the trust agreement referred to in the order, Exhibit 3?

A. It is.

(Discussion of counsel, off the record).

(Whereupon, it was agreed that a copy of said trust agreement was to be furnished by Mr. Donart, and same was deemed marked, "Plaintiff's Exhibit 4 for identification.")

Mr. Eberle: Now, it is understood that Mr. Donart will endeavor to mail you a copy of that, Mr. Kester.

Q. (By Mr. Eberle) And in the list of creditors there appears one J. A. McGill, Paris, Texas, for \$33,694.00? A. Yes, sir.

Q. Have you the records of the trust?

A. Yes, sir.

Q. Have any payments been made to any of the creditors?

A. (Witness shakes head in negation). Well, let's see. Nothing more than interest.

Q. Has interest been paid to anyone on account of the claim denominated J. A. McGill?

(Deposition of Scott Brubaker.)

A. No.

Q. Has any payment been made on account of that claim?      A. No.

Q. Has any interest been paid, or any payment been made on account of the note or mortgage to J. A. McGill?      A. No.

Q. Do you know who sold the fruit from the lands described in the trust agreement, in 1941?

A. All of the land, or just those mortgaged to— or just on which McGill has the mortgage? Do you have reference [135] to all—

Q. (By Mr. Eberle) Well, either one.

A. Without referring to records, I would say that F. H. Hogue, Inc. sold them.

Q. Do you know who handled the fruit on the lands mortgaged to J. A. McGill?

A. The lands that are mortgaged to J. A. McGill was leased to J. A. McGill by the trustee; C. N. Kinney, Trustee.

Q. And what were the terms of that lease?

A. Do you want them in detail?

Q. Well, have you got the lease? Have you got a copy of the lease?

A. No, I haven't, no.

Q. As trustee you do not have a copy of that lease, then?      A. No.

Q. Well, who looked after the interests of J. A. McGill, then, in connection with that lease?

A. C. N. Kinney, agent—or—yes, C. N. Kinney, agent for J. A. McGill.

(Deposition of Scott Brubaker.)

Q. C. N., or C. H.?           A. C. N.

Q. In other words, the trustee leased to McGill, and then was his agent in looking after it?

A. Yes.

Q. Where did you get the information about the lease?

A. I got it from C. N. Kinney, from the record that was turned over to me.

Q. And you say you haven't that record now?

A. I haven't the lease; I haven't a copy of the lease. [136] I have looked for it, but none was turned over to me.

Q. (By Mr. Eberle) What record would show what you have just testified to?

A. Well, I don't have that record now, but I have seen it, where he kept a record of the operations of the three orchards which he had leased,—which C. N. Kinney, trustee, had leased to McGill.

Q. And what was the rental paid?

Mr. Donart: That is objected to as immaterial.

A. (No answer).

Q. (By Mr. Eberle) Can you answer the question?

A. My recollection is that it was twenty-five per cent of the profits from the operation of the three orchards.

Q. And did the trust receive any payment?

A. Yes.

Q. Did the trust make any payment in connection with the property?           A. To whom?

(Deposition of Scott Brubaker.)

Q. Well, to anyone.

A. Not to any of the creditors.

Q. Who—do you know personally who supervised the operation of this property leased to Mr. McGill?

A. Direct supervision, do you mean?

Q. Well, either direct or general.

A. Well, C. N. Kinney, agent for J. A. McGill, looked after the payments and so forth, but not the direct supervision or—of the orchards—itsself. He employed people to do that.

Q. And was that in 1941?

A. Yes. [137]

Q. (By Mr. Eberle) Was C. H. Kinney out here at that time?

A. Well, he was here at intervals, but——

Q. During the time he was here, did he have anything to do with that property?

A. In what respect?

Q. In any respect.

A. Well, none that I can recall.

Q. Well, after he took his father, C. N. Kinney, home, or back to Denver, in October, and after he came back here, what did he have to do with that property?

A. Well, the operations of the—the 1941 operations were all closed up by that time, that is, as far as the operations under the lease were concerned.

Q. Well, I am asking you, did he have anything to do with the property at all.

A. Well, I wouldn't be able to state whether—

(Deposition of Scott Brubaker.)

whether he had anything to do with it or not.

Q. Did he act as agent for Mr. McGill in any capacity in connection with this claim or this property?

The Witness: Will you state that question again?

(Pending question read).

A. (No answer).

(Pending question again read).

A. I wouldn't be able to state positively whether he did or not.

Mr. Eberle: That's all.

Mr. Donart: That's all.

(Witness excused). [138]

Mr. Eberle: I offer Exhibit 4 at this time.

(Discussion, off the record).

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FREDERICK C. HOGUE,

recalled as a witness on behalf of the plaintiff, and having been previously duly sworn, testified as follows, upon further

Redirect Examination

By Mr. Eberle:

(Whereupon, a bill of lading dated August 20, 1941, from Dayton Veneer and Lumber Mills, Americus, Georgia, to Cummer-Graham Company, Nampa, Idaho, covering a "roller

(Deposition of Frederick C. Hogue.)

car," was marked, "Plaintiff's Exhibit 5 for Identification.")

Q. Now, Mr. Hogue, handing you Exhibit number 5 for identification, I will ask you if that is the bill of lading of one of the roller cars that you have been testifying to.

(Witness examines the exhibit and other records for some time. Discussion, off the record).

A. Yes, I would say it was.

Mr. Eberle: I offer that in evidence.

Q. Now, Mr. Hogue, have you found the contract between you and Cummer-Graham, or any of the contracts between you and Cummer-Graham Company?

A. No, I haven't found it yet.

Q. How long would it take you to find it?

A. That's what I don't know.

Q. Well, you surely must have one of those contracts, mustn't you?

A. Yes, it must be around here somewhere.

Mr. Eberle: Well, can we hold this deposition [139] open, and have him send it to the reporter?

Mr. Donart: That's right. If he finds one, he can send it to the reporter.

Q. (By Mr. Eberle) Well, how long since you have seen this contract, Mr. Hogue?

A. Oh, it's been six or seven months, probably.

(Deposition of Frederick C. Hogue.)

Q. Was it in your file then?

A. I believe it was in the office here, some place.

Q. Have you a copy of it?

A. No, that's what I am looking for, is the copy.

Q. Have you any correspondence about these contracts?           A. No.

Q. The negotiations were all handled by Mr. C. H. Kinney orally? Or were they in writing?

A. Well, I had a contract with Cummer, if I could find it.

Q. I mean the negotiations, or any correspondence about them.

A. Huh, uh. You see, he was here when I signed it.

Q. Who was that?           A. Mr. Kinney.

Q. Is anything said in this contract about storage and insurance?

A. Yes, there is something in there about storage and insurance; I don't know just exactly the wording of it.

Q. Is there anything in there about the consignment inventory that you keep here?

A. I don't know.

Q. Let's see, in what sort of a book do you keep this consignment inventory? [140]

A. Well, we just keep a—what you might say a notation on it.

Q. (By Mr. Eberle) You mean you keep a memorandum of some kind?

A. On our inventory.

(Deposition of Frederick C. Hogue.)

Q. Well, the girl said you keep a consignment inventory, this afternoon, when we asked about it. What is that consignment inventory? How is it kept?

A. We count the number of baskets and number of hampers we have, so we will know what it is.

Q. Is that kept in a separate book?

A. I can't say; I don't know whether it is in the book or not. We keep just a record of the number of pieces.

Q. Do you know whether your contract is similar to that of Mr. Atkinson?

A. No, I wouldn't know about that.

Q. Did anyone ever tell you whether it was or not?

A. The same as Reilly has? I don't believe they did. I don't know at all about his.

Q. Well, in taking out this insurance that you say there is some provision for in this contract, what form do you take that insurance out in? Do you have a policy or a copy of a policy?

A. Well, I ran into one here. (Witness produces a document).

Q. Is this a current one or an old one?

A. 1940.

(Discussion of counsel and witness, off the record).

A. I think that Cummer-Graham has got the policy. I [141] believe that they've got it.



(Deposition of Frederick C. Hogue.)

Q. (By Mr. Eberle) So that you wouldn't have the policy here?

A. No. I think they've got the policy.

Q. Well, would your books show whether you paid the premium here?

A. Yes, we paid the premium.

Q. And then you sent the policy to them?

A. I think so.

Q. Do you think you can find that contract tomorrow, Mr. Hogue?

A. I will keep on trying this afternoon.

Mr. Eberle: Then we will come back here for a minute.

(Whereupon, the witness was excused and by agreement the taking of depositions adjourned to the office of J. C. Palumbo, in Payette, Payette County, Idaho).

(Time, 3:14 P. M.) [142]

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J. C. PALUMBO,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Your name, Mr. Palumbo?

A. J. C. Palumbo.

Q. And in 1940 did you do some business with Cummer-Graham Company?

(Deposition of J. C. Palumbo.)

A. I think I did. I would have to get more details.

Q. Will you get the files?

A. All right. (Witness searches records). I think we did.

Q. Could I have the bills of lading and invoices?

A. She will get them. (Witness hands counsel certain records produced by witness' secretary).

Q. Are these for 1940?           A. I think so.

Q. Now, Mr. Palumbo, do you suppose we could put these in exhibit, or would you want them returned and copies made of them—copies made for your files?

A. It doesn't make any difference to me.

Q. We could make a copy for your files or have copies made and return to you.

A. You had better make several copies and return this to me.

(Discussion of counsel and witness, off the record).

(Thereupon, a bill of lading, invoice, and other papers pertaining to a shipment from [143] defendant on September 5, 1940, was marked, "Plaintiff's Exhibit 6 for identification.")

Q. (By Mr. Eberle) Now, handing you Exhibit 6, Mr. Palumbo, I will ask you what these papers are.

A. They cover the baskets, 450 dozen.

Q. And what's that (indicating a paper)?

(Deposition of J. C. Palumbo.)

A. That's a copy where we paid them by check.

Q. Did you send the original of that to Mr. Kinney?

A. I think we paid him right here; I think Mr. Kinney came in here and got the checks. I am sure he came here and got it. That is my recollection.

Q. What is that, another invoice (indicating a paper)?

A. This is a copy of the invoice for 450 dozen.

Q. And that's the bill of lading for the same (indicating another paper)?

A. Yes.

Q. (indicating still another paper in the exhibit) And a letter from Mr. Kinney,—?

A. Yes.

Q. (continuing) —the last sheet of the exhibit?

A. Yes, for the same car, "diverted to yourselves at New Plymouth."

Mr. Eberle: I offer this Exhibit 6.

Mr. Donart: May I ask a few questions?

#### Cross Examination

By Mr. Donart:

Q. Calling your attention first to the letter of September 23d, which apparently accompanied your remittance: Your letter is addressed to A. V. Kinney, agent, is it not?

A. Yes. [144]

Q. (By Mr. Donart) And calling your attention to the letter written to you under September 11th: It is signed by A. V. Kinney, agent?

A. Yes, sir.

(Deposition of J. C. Palumbo.)

Q. Now, Mr. Palumbo, you notice the bill of lading here, it's consigned from Mineola, Texas, September 5th, to Cummer-Graham Company, Nampa? A. Yes, sir.

Q. Do you know when you ordered that car?

A. No, sir, I couldn't tell you.

Q. Do you know whether you ordered it before September 5th or afterward?

A. No, I have no way to know. Usually they have these cars rolling, see, and then while they have them rolling we buy them while they are in transit. I think that's why this car was rolling in their name; then when we need a car, they can divert it.

Q. But you have no way of knowing where this car was when you bought it? A. No.

Q. Whether it was somewhere between Nampa and Mineola, or where it was?

A. Well, it would have to be between Nampa and Mineola; but what point it was the day I bought it, I have no way of knowing.

Q. But they diverted it to you at New Plymouth? A. Yes, sir.

Q. But whether it was within the state of Idaho or not, at the time you bought it, you don't know?

A. No. [145]

#### Redirect Examination

By Mr. Eberle:

Q. Mr. Palumbo, who did you talk to about buying this car?

(Deposition of J. C. Palumbo.)

A. Well, Mr. Kinney. He came here and sold me several cars, no doubt, because that speak for itself.

Q. Now, how many cars did you buy from Cummer-Graham in 1940?

A. No other cars in 1940.

Q. That's the only one, then?

A. Yes, that's all; and none this year.

Q. You didn't buy that car through anybody, that is, you didn't buy that through Atkinson or Hogue?

A. No.

Q. You bought it through Mr. Kinney?

A. Yes.

#### Recross Examination

By Mr. Donart:

Q. You mean A. V. Kinney?

A. That's right.

Q. Now, just one more question: That car was diverted to you in its entirety?

A. Yes.

Q. You got the entire car?

A. Yes.

Q. And none of the packages——?

A. (interposing) No.

Q. And the seal of the car wasn't broken until it was diverted to you?

A. No.

(Witness excused). [146]

(Whereupon, by agreement, the taking of depositions was returned to the office of Frederick C. Hogue, in Payette, Payette County, Idaho).

R. H. DeHAVEN,

called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, upon

Direct Examination

By Mr. Eberle:

Q. Will you state your name?

A. R. H. DeHaven.

Q. Where do you reside?

A. Benton Harbor, Michigan.

Q. What position if any do you hold with the plaintiff, The Straight Side Basket Corporation?

A. I work for them as general representative.

Q. Are you acquainted with the officers of the defendant, Cummer-Graham Company?

A. I am.

Q. Who are the officers of that company?

A. J. A. McGill, president; J. C. DeShong, vice-president; H. Wallace Norton, vice-president; and A. C. Mackin, secretary-treasurer.

Q. Are you acquainted with the officers of the Veneer Products Company?      A. I am.

Q. Who are the officers of that company?

A. C. H. Kinney, president, in care of F. P. Cranston, Denver, Colorado; J. A. McGill, vice-president, care of Cummer-Graham, Paris, Texas; and A. C. Mackin, secretary and [147] treasurer, care of Cummer-Graham Company, Paris, Texas.

Q. (By Mr. Eberle) State what if any position the C. H. Kinney whom you have just mentioned as being president of the Veneer Products Company holds with the Cummer-Graham Company.

(Deposition of R. H. DeHaven.)

Mr. Donart: That is objected to upon the ground that it is incompetent. It is not the best evidence.

Mr. Eberle: Well, strike that.

Q. (By Mr. Eberle) Do you know C. H. Kinney? A. I do.

Q. Do you know in what capacity he has been employed by the Cummer-Graham Company during recent years?

Mr. Donart: That calls for an answer, "Yes," or "No."

A. Yes, sir.

Q. (By Mr. Eberle) In what capacity is that?

A. Sales manager.

Q. Now, state whether or not he is the same person that you have just mentioned as president of the Veneer Products Company. A. He is.

Q. Do you know whether J. A. McGill is an officer in both Cummer-Graham Company and Veneer Products Company? A. I do.

Q. And what offices does he hold in those companies?

A. He is president of Cummer-Graham Company, vice-president of Veneer Products Company.

Q. Do you know whether Mr. Mackin is an officer of both companies? A. He is. [148]

Q. (By Mr. Eberle) And just state what offices he holds.

A. Secretary and treasurer of both companies.

Q. Do you know in what state Cummer-Graham Company and Veneer Products Company were organized?

(Deposition of R. H. DeHaven.)

A. I am not sure just in which states they were organized. I do know that Cummer-Graham Company is a Texas corporation and that the Veneer Products Company is a Colorado corporation.

Q. Do you know where the Veneer Products Company manufactures products?

A. I do. In Texas.

Q. I will ask you——?

The Witness: Pardon me.

Q. (continuing) Just state where, in what state, they manufacture any products.

A. In Texas.

Q. Do they manufacture any products in Colorado? A. No.

Q. Do you know whether any of the officers of the Veneer Products Company are residents of the state of Colorado?

A. No, they are not, at the present time.

Q. State whether or not the Veneer Products Company reports to the Department of State or the Secretary of State of the State of Colorado.

Mr. Donart: That is objected to as not being the best evidence.

Mr. Eberle: I am not asking what the report is.

Mr. Donart: Well, whether they do or not, the [149] records would be the best evidence.

A. They do, and I have a copy of their 1941 report.

Q. (By Mr. Eberle) Do you know whether C. H. Kinney, to whom you have just referred, is an officer of any other manufacturing concern?



(Deposition of R. H. DeHaven.)

A. I do.

Q. Just state what offices he holds and in what company or companies.

A. One other factory I know of in which he is interested, he is vice-president. That is the F. E. Prince Company of Pittsburg, Texas.

Q. Are you acquainted with A. V. Kinney, whose deposition was taken in Paris, Texas, February 27, 1942?

A. I am.

Q. What relation is he to C. H. Kinney, whom you have mentioned?

A. Brother.

Q. Do you know what office A. V. Kinney holds in the F. E. Prince Company of Pittsburg, Texas?

A. I only know that he is general manager of that company.

Q. What office does he hold in that company?

A. I don't believe he is an officer.

Q. In what capacity does he act, then?

A. As manager, general manager.

Q. Do you know whether A. V. Kinney was ever employed by Cummer-Graham Company as a salesman?

A. I do.

Q. Do you know of any sales that he made in the state of Idaho? [150]

A. I do.

Q. (By Mr. Eberle) Were you in the state of Idaho during the basket selling season when Mr. A. V. Kinney and Mr. C. H. Kinney were also there?

A. Yes, sir.

Q. What sales if any do you know were made in Idaho at that time?

(Deposition of R. H. DeHaven.)

Mr. Donart: May I ask a question here in aid of an objection?

What is the source of this knowledge?

The Witness: The source——

Mr. Eberle: Well, I assume it's his personal knowledge.

Mr. Donart: Well, that's what I want to find out.

Mr. Eberle: I mean while you were here.

Mr. Donart: What is the source of any knowledge you have as to any sales that you claim that you know that they made in this state?

The Witness: I have seen orders in their possession, signed orders in their possession. I have also seen checks in their possession, in payment of baskets which they have sold.

Mr. Donart: How did you know that it was in payment of baskets that they had sold or that some other agent had sold and that they had collected for?

The Witness: Only that they said that that's what the check was for.

Mr. Donart: Then your knowledge of whether [151] they made a sale is based upon what they told you?

A. In that instance involving the check, yes; but in the event where I saw the sales order, signed order for baskets, together with the statement from A. V. Kinney that he had just taken that order, I believe I can say that I know that that is true.

(Deposition of R. H. DeHaven.)

Mr. Donart: Well, we object to this evidence upon the ground that it is incompetent in that it is not the best evidence, and purely hearsay and secondary.

Q. (By Mr. Eberle) Mr. DeHaven, state whether the Cummer-Graham Company and the Veneer Products Company make baskets under a license from your company, The Straight Side Basket Corporation. A. They do.

Q. State whether any of these baskets which are made under these contracts with your company are sold in the state of Idaho. A. Many of them.

Q. And state whether your company is interested—

Mr. Donart: (interposing) Now, just a minute. I want to ask a question here:

What are you using this evidence for, on the motion to dismiss?

Mr. Eberle: Yes.

Mr. Donart: And for no other purpose?

Mr. Eberle: Yes; I think that is the stipulation.

Mr. Donart: That's what I was getting at. If you are trying part of your lawsuit here, we [152] aren't stipulating that.

(Pending question, as stated, read).

Q. (By Mr. Eberle, continuing) —in any way in baskets so sold in the state of Idaho?

A. They are.

Q. In what way?

A. We receive a percentage of the gross selling

(Deposition of R. H. DeHaven.)

price of all baskets sold in Idaho, or other states, for that matter, that are manufactured under our licenses.

Q. Are you familiar with the way or manner in which the Cummer-Graham Company sells its baskets in the state of Idaho? A. Yes.

Q. Will you state whether or not Cummer-Graham Company makes all of its sales in Idaho through so-called wholesale dealers or jobbers?

A. They do not.

Q. Do you know whether or not baskets shipped into Idaho by Cummer-Graham Company are always shipped in fulfillment of orders already booked? A. They are not.

Q. State whether or not all baskets shipped into Idaho by Cummer-Graham Company are shipped in filling of orders already booked.

Mr. Donart: Now just a minute. A question or two in aid of an objection.

What is the source of your information upon which you would answer that question if you answered it?

The Witness: I have been present and heard—and have heard A. V. Kinney and C. H. Kinney, [153] both, for that matter, telephone the railroad companies and divert cars which were consigned to the Cummer-Graham Company in some one place or another, usually Nampa, Idaho. They would give instructions to the railroad clerk to divert a car, and describe the car by number and contents; and

(Deposition of R. H. DeHaven.)

I have heard them subsequent to diverting the car telephone the customers and tell them that such car had been diverted and would be on track in such-and-such a place.

Mr. Donart: Did you see the original bill of lading on any of those cars, so that you know who they were billed to in this state, originally?

The Witness: The ones that I just described as being diverted?

Mr. Donart: Yes.

The Witness: No, I did not see those bills of lading.

Mr. Donart: That is objected to on the ground that it's incompetent, that any answer of his would be secondary evidence.

(Pending question read).

A. They are not shipped in fulfillment of orders already booked—all of them. Some of them are, of course.

Q. (By Mr. Eberle) State, Mr. DeHaven, how these cars are shipped, where there are no prior orders.

A. I have seen invoices and bills of lading on cars that were shipped by Cummer-Graham Company into Idaho with the bill of lading reading, "Consigned to Cummer-Graham Company, Nampa, Idaho." [154]

The Witness: May I have that question repeated, please?

(Last question and answer read).

(Deposition of R. H. DeHaven.)

The Witness: I believe that about covers the question.

Q. (By Mr. Eberle) Mr. DeHaven, will you state whether C. H. Kinney made any sales in Idaho of baskets or supplies for and on behalf of Cummer-Graham Company to growers in Idaho.

A. That is C. H. Kinney?

Q. Yes.

A. Only that I have talked with customers whom he has sold.

Mr. Donart: Well, that is objected to. I move to strike that answer; that is not responsive to the question.

You asked him whether he knows. It calls for "Yes" or "No."

Mr. Eberle: Yes, that's right.

Q. (By Mr. Eberle) Do you know on that?

The Witness: Do you insist upon an answer, "Yes" or "No"?

Mr. Donart: Yes.

Mr. Eberle: Well, you either know or you don't know.

A. I don't know.

Mr. Donart: I didn't think so.

Q. (By Mr. Eberle) Mr. DeHaven, do you know whether Cummer-Graham Company has in recent years sold direct to growers in Idaho? [155]

A. I do.

Q. (By Mr. Eberle) And just state what sales were so made.

(Deposition of R. H. DeHaven.)

A. J. C. Palumbo, for one. May I ask you: Do you mean by that question whether Cummer-Graham direct representatives made the sales or not?

Q. Well, including those made by direct representatives and otherwise.

A. I know that Cummer-Graham Company report to us, like all of our other licensees, every month on all sales made by their company in various states, and they report baskets delivered——

Mr. Donart: (Interposing) Now, just a minute. Are those reports in writing?

The Witness: They are.

Mr. Donart: Object to the witness testifying to the contents of the writing. The instrument itself is the best evidence.

Q. (By Mr. Eberle) Have you any of those reports here?      A. I have.

Q. May we have them?

A. (After search of records) I am sorry. I don't have one of those reports here; but I can obtain them for you.

Q. Mr. DeHaven, can you supply those reports?

A. I can.

Mr. Eberle: Mr. Donart, may it be understood that these reports can be marked Exhibit number 7 for Identification and be supplied to Mr. Kester within the next few days, subject of course to your objection when offered in evidence upon the [156] hearing?

(Deposition of R. H. DeHaven.)

Mr. Donart: Yes.

Q. (By Mr. Eberle) Now, Mr. DeHaven, have you ever seen a check paid to either C. H. Kinney or A. V. Kinney, in payment of baskets sold by either of them to a grower in Idaho?

A. I have. Let me qualify that: I have never seen a check payable to—made payable to either of the Kinneys; I have seen checks in their possession.

Q. In their possession. Will you just state the circumstances?

A. Yes. I saw a check in Arthur, or A. V., Kinney's possession; rather, he showed it to me, made payable to Cummer-Graham Company by F. C. Marquardsen, I believe, at Buhl, Idaho, in payment of baskets used in the year 1939. The amount of that check was \$3,506.48.

Q. Mr. DeHaven, do you know whether Cummer-Graham Company owns any stock in the Veneer Products Company?

Mr. Donart: Oh, that is objected to as incompetent and not the best evidence. The records of those two companies would be the best evidence of that.

A. I know that—

Q. (By Mr. Eberle, interposing) Well, just answer "Yes" or "No."

A. I do not know.

Q. Do you know of any record with reference to that stock or the ownership thereof?

A. No, I don't.



(Deposition of R. H. DeHaven.)

Q. Did the officers of the Cummer-Graham Company ever make any statement to you with reference to the ownership of [157] that stock?

A. They have.

Q. (By Mr. Eberle) And just state what they were and who was present.

A. What officers?

Q. Well, I say, what officers, when, and who was present.

A. I have heard general discussions about Veneer Products Company in which Mr. J. A. McGill was present, and in which Mr. C. H. Kinney was present, and myself, and other members of our firm. In that discussion it has been disclosed that C. H. Kinney, president of the Veneer Products Company, holds controlling interest of the Veneer Products Company and that he has accepted Cummer-Graham stock in payment of assets that Cummer-Graham has taken from the Veneer Products Company or acquired.

Q. Do you know—what if anything do you know about separate records being kept of the transactions of the Veneer Products Company and the Cummer-Graham Company?

A. They do not keep separate records.

Q. Do these companies make a report to you in connection with royalties due your company?

A. They do.

Q. And do they make any segregation as between the Veneer Products Company or Cummer-Graham Company?

(Deposition of R. H. DeHaven.)

Mr. Donart: Just a minute. Are those reports oral or written reports?

The Witness: Written.

Q. (By Mr. Eberle) Have you one of those reports here?

A. (Producing a document) I have. [158]

(Whereupon, a report for month of March, 1941, made to plaintiff by defendant and Veneer Products Company, was marked, "Plaintiff's Exhibit 8 for Identification.")

Q. (By Mr. Eberle) Mr. DeHaven, handing you Plaintiff's Exhibit number 8 for Identification, I will ask you what that is.

A. That is a written report made to us by the Cummer-Graham Company and Veneer Products Company. It represents the sales made in the month of March, 1941.

Mr. Eberle: I offer that in evidence.

The Witness: May I state further that it has attached the check made payable to us in payment of license fees due for the sales shown on the report, and that the attached voucher is from a Cummer-Graham check in payment of those license fees for both the Veneer Products and Cummer-Graham, which is a customary practice.

Q. Mr. DeHaven, state whether or not Mr. C. H. Kinney negotiated with dealers with reference to contracts in Idaho. A. He did.

Q. And just state when and with whom.

A. I know of two contracts that he negotiated,

(Deposition of R. H. DeHaven.)

called retail dealers' contracts. They were negotiated by him with F. H. Hogue and F. C. Hogue for the year 1939; the contracts were witnessed—the signatures were witnessed by C. H. Kinney and forwarded to Paris, Texas, to the Cummer-Graham Company and subsequently approved by an officer of that company and mailed to Straight Side Basket Corporation.

Mr. Donart: I move to strike all that part of it beginning about "signatures were witnessed," [159] and so forth, as not being responsive to any question that was asked the witness.

Mr. Eberle: Now read the question again.

(Pending question, and preceding question and answer, read).

The Witness: Do you want me to restate that.

Q. (By Mr. Eberle) Well, do you have anything to add to what you have already said?

A. No.

Q. I believe you said, Mr. DeHaven, that you were in Idaho at times when C. H. Kinney was also here?

A. Yes, sir.

Q. Will you just state what you observed of Mr. Kinney's transactions or actions in connection with his business as sales manager of Cummer-Graham Company?

A. I observed that Mr. Kinney was a representative of the Cummer-Graham Company with

(Deposition of R. H. DeHaven.)

authority to act on any questionable matters. I observed that he gave——

Mr. Donart: (Interposing) Now, just a minute. I am going to move to strike that part of it about his authority to act, on the ground that's merely the witness' conclusion.

Q. (By Mr. Eberle) Just state what he did, what you saw him do.

A. I have already stated that I saw him and heard him divert cars to customers and so advise the customers that he had done so. I saw him and heard him give instructions to his brother, A. V. Kinney, who was then a salesman for Cummer-Graham Company. I saw him do many things that I can't specifically described at the moment, as being a representa- [160] tive in the territory of a firm that placed responsibility upon his shoulders.

Q. (By Mr. Eberle) Did you at any time see him contact any customers or growers using Cummer-Graham products in Idaho?

A. I have seen him talk with growers using Cummer-Graham products in Idaho?

Q. Mr. DeHaven, will you state in what state there are sold the most baskets under contract from your company, made under contract from your company? A. Idaho.

Q. And will you also tell us what types of baskets the Cummer-Graham Company make under your contract, and sell in Idaho?

A. The Cummer-Graham Company make under

(Deposition of R. H. DeHaven.)

our contracts the continuous stave three hoop straight side baskets, both in bushels and half-bushels; they make the S. I. B. type or Ideal Hamper, bushel and half-bushel; and they make the S. I. B. type pea basket. They are all sold in this state by Cummer-Graham Company.

Q. And do you know what the Cummer-Graham volume is in Idaho?

A. Yes, it's from past records, I believe it is about——

Mr. Donart: (Interposing) Just a moment, that is objected to on the ground that if he is testifying from records, the records themselves are the best evidence.

Q. (By Mr. Eberle) Do you know the approximate volume?

A. I do. It's approximately two hundred cars annually.

Q. And what would that be in dollars and cents?

A. Approximately \$200,000.00 in gross business. [161]

Q. (By Mr. Eberle) Do you know whether Reilly Atkinson receives an overriding commission on all baskets sold in Idaho?

A. I have never seen Reilly Atkinson's contract, but—therefore I do not know definitely.

Q. Have you ever talked to anyone about either that contract or similar contracts in Idaho?

A. I have.

Q. And with whom?

(Deposition of R. H. DeHaven.)

A. With Mr. McGill and Mr. Kinney.

Q. And what was their statement with reference to such contracts?

A. That Reilly Atkinson receives, did receive at that time, anyway——

Q. (Interposing) When was that?

A. 1939. (Continuing former answer) ——a commission of seven per cent on all baskets sold; I should say on all baskets of a certain type sold in Idaho, whether sold by Mr. Atkinson or sold by Cummer-Graham or their representatives.

Q. Mr. Hogue referred to a Basket Sales Company, Mr. DeHaven. Will you tell us whether you know if that company acted as an agent for Cummer-Graham Company?      A. Yes, I do know.

Q. And just state in what capacity the Basket Sales Company acted.

A. As a sales organization which sold baskets for Cummer-Graham and other manufacturers.

Q. And with reference to the baskets purchased by F. H. Hogue and to which he has testified today as having been billed to him by the Basket Sales Company, Mr. DeHaven, were those Cummer-Graham baskets? [162]

A. Cummer-Graham sold through the Basket Sales Company approximately forty per cent, I believe, of the gross sales of that company; and baskets that were sold by that company went to customers all over the United States; and naturally forty per cent of those baskets, or perhaps the ratio

(Deposition of R. H. DeHaven.)

was greater than that, that were sold through that company were naturally Cummer-Graham's baskets.

Q. (By Mr. Eberle) Now, are you familiar with the F. E. Prince Company?

A. Yes, sir.

Q. Where is it located?

A. Pittsburg, Texas.

Q. And are any of the Kinneys associated with that company?

A. A. V. Kinney is general manager, and C. H. Kinney is president,—vice-president.

Q. C. H. Kinney is vice-president?

A. That's right.

Q. A. V. Kinney is general manager?

A. That's right.

Q. Are they brothers?

A. That's right.

Q. Are they sons of A. N. Kinney?

A. Sons of C. N. Kinney.

Q. Now, did the F. E. Prince Company sell any baskets in Idaho?           A. They did.

Q. Have you any record of those sales?

A. I have.

Q. Where is that record? [163]

A. (Witness produces a document).

(Whereupon, two reports for the months of September and October, 1941, made to plaintiff by F. E. Prince Company, were stapled together and marked, "Plaintiff's Exhibit 9 for Identification.")

(Deposition of R. H. DeHaven.)

Q. (By Mr. Eberle) Handing you Exhibit 9, I will ask you what that is, Mr. DeHaven?

A. This is a written report signed by A. V. Kinney, who is the manager of the F. E. Prince Company, and this report represents the sales made by the F. E. Prince Company of our licensed baskets for the months of October and September, 1941. There are attached to this report a copy of a letter from the Straight Side Basket Corporation to the F. E. Prince Company dated November 5, 1941, and a letter in reply to that letter, made by the F. E. Prince Company, signed "A. V. Kinney, Manager."

Mr. Eberle: We offer this in evidence.

Now, I think that's all.

Mr. Donart: Just a question or two:

#### Cross Examination

By Mr. Donart:

Q. I believe you said in response to one question that there was one car of baskets sold to J. C. Palumbo; is that right?

A. That's right.

Q. That's the J. C. Palumbo whose deposition was taken a short time ago,—today—is that right?

A. Yes.

Q. At the time we were taking that deposition you were positive that there were ten or twelve cars sold to him, were [164] you not?

A. I wasn't positive.



(Deposition of R. H. DeHaven.)

Q. (By Mr. Donart) The information you had was that there were ten or twelve cars, wasn't it?

A. Mr. Palumbo had so stated.

Q. The information was that there were ten or twelve cars, wasn't it?

A. The verbal information, yes, sir.

Q. And that information was off the difference between one car and ten or twelve cars,—incorrect to that extent, was it not?

A. I believe you could say that.

Q. Well, could you say that, without choking you?

A. Yes, that's correct.

Mr. Donart: That's all.

Mr. Eberle: That's all.

(Whereupon, at about 4:30 P. M. of said day, the taking of said depositions was concluded, with the understanding that certain exhibits were to be furnished by witnesses and counsel to the reporter and notary public within the next few days, to be marked and included with these depositions).

Saturday, March 21, 1942.

(Copies of reports to plaintiff from defendant and Veneer Products Company for certain months in 1939, 1940, and 1941, were this day furnished by counsel for the plaintiff and marked, "Plaintiff's Exhibit 7 for Identification." See page 72 of this transcript for stipulation.)

Friday, March 27, 1942.

(A copy of trust agreement was this day furnished by counsel for the defendant and marked, "Plaintiff's Exhibit 4 for [165] Identification." See page 51 of this transcript).

Saturday, March 28, 1942.

(A certified copy of petition for appointment of successor trustee, filed in District Court for Payette County, Idaho, on January 14, 1942, was this day furnished by counsel for the plaintiff, and marked, "Plaintiff's Exhibit 4 for Identification." See page 50 of this transcript for reference thereto).

(A certified copy of mortgage dated February 10, 1939, from F. H. Hogue and wife to J. A. McGill was this day furnished by counsel for the plaintiff, and marked, "Plaintiff's Exhibit 11 for Identification." See pages 46 and 50 of this transcript for references thereto).

[Reporter's Certificate in due form.]

[Notary's Certificate in due form.] [166]

That on Friday, March 27, 1942, not having received the contract or contracts between defendant and Frederick C. Hogue supposed to be supplied by the latter, I phoned said Frederick C. Hogue about 4:55 P. M. of said day and asked him about the matter; that said Frederick C. Hogue then stated to me that he was still unable to locate his contracts with Cummer-Graham Company, or any [167] one

of such contracts; that he had made a thorough search of his files and records, and was positive he does not have such contract or contracts in his possession.

[Endorsed]: Filed March 30, 1942. [168]

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[Title of Court and Cause.]

NOTICE OF APPEAL

To Straight Side Basket Corporation, the above  
Named Plaintiff:

Cummer-Graham Company hereby gives notice that it hereby appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment of the above entitled Court dated September 1, 1942, wherein judgment was entered against the defendant and in favor of the plaintiff in the sum of Sixteen Thousand Six Hundred One and 85/100 Dollars, plus costs in the amount of Two Hundred Thirty-Two and 14/100 Dollars, and from the whole of said judgment. This appeal is taken upon all questions of law and facts.

GEO. DONART, Residing at Weiser, Idaho

FREDERICK P. CRANSTON, Residing at 409  
Equitable Building, Denver, Colorado

Attorneys for Defendant.

[Endorsed]: Filed Sept. 9, 1942. [172]

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[Title of Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, a judgment has been entered in the above entitled Court in favor of the above named plaintiff and against the above named defendant in the amount of Sixteen Thousand Six Hundred One

and 85/100 Dollars, together with costs in the amount of Two Hundred Thirty-Two and 14/100 Dollars, and the defendant being desirous of appealing from said judgment to the United States Circuit Court, Ninth Circuit, desires to furnish a bond on appeal condition as required by Rule 73, Subdivision C of the Rules of Civil Procedure of the District Courts of the United States;

Now, Therefore, National Surety Corporation, a corporation organized and existing under and by virtue of the laws of the State of New York and licensed to do a general surety business in the State of Idaho does hereby obligate itself unto the above named plaintiff in the penal sum of Two Hundred Fifty (\$250.00) dollars;

The condition of this bond is such that if the defendant and appellant shall pay all costs incurred by the plaintiff and respondent on said appeal, if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if said judgment is modified, then and in that event this obligation shall be void. Otherwise the same shall remain in full force and effect.

Dated this 9th day of September, 1942.

[Seal] National Surety Corporation

By C. G. TAYLOR, Agts. and Attys. in Fact  
[Endorsed]: Filed Sept. 9, 1942. [173]

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[Title of Court and Cause.]

STATEMENT OF POINTS RELIED ON

Cummer-Graham Company relies upon the fol-

lowing errors and says that in the proceedings below the Court erred in the following respects:

1. The Court erred in overruling defendant's motion to dismiss.

2. The Court erred in denying motion to quash service of summons.

3. The Court erred in granting leave to the defendant to file amended complaint.

4. The Court erred in granting to plaintiff leave to amend the amended complaint in the manner set forth in notice of amendment to amended complaint dated August 1, 1942 signed by the plaintiff's attorneys.

5. The Court erred in granting motion of plaintiff for a summary judgment.

6. The Court erred in entering judgment against defendant in the sum of \$16601.85 on September 1, 1942.

GEO. DONART, Residing at Weiser, Idaho.

FREDERICK P. CRANSTON, Residing at 409  
Equitable Building, Denver, Colorado.

Attorneys for Defendant.

[Endorsed]: Filed September 9, 1942. [179]

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[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Cummer-Graham Company designates the following portions of the record and proceedings to be contained in the record on appeal from judgment entered September 1, 1942, wherein the Court entered judgment in favor of plaintiff and against

defendant in the sum of Sixteen Thousand Six Hundred One and 85/100 Dollars:

1. Complaint.
2. Summons and Return of Summons.
3. Motion to dismiss.
4. Affidavit of C. H. Kinney in support of Motion to Dismiss.
5. Counter Affidavit of C. H. Kinney in support of Motion to Dismiss.
6. Amended Complaint.
7. Notice of Amendment to Amended Complaint.
8. Order of August 11, 1942, permitting Amendment to Amended Complaint.
9. Answer to Amended Complaint.
10. Adoption of Motion and Answer.
11. Motion for Summary Judgment.
12. Opinion and Order of Court dated April 15, 1942.
13. Final judgment in favor of plaintiff and against defendant.

14. Depositions of C. H. Kinney, A. V. Kinney, A. C. Mackin, Frederick C. Hogue, F. H. Hogue, Scott Brubaker, J. C. Palumbo and H. H. DeHaven. [180]

15. Notice of Appeal, Undertaking on Appeal, Statements of Points Relied On, this Designation of Contents of Record on Appeal.

GEO. DONART, Residing at Weiser, Idaho.

FREDERICK P. CRANSTON, Residing at 409 Equitable Building, Denver, Colorado.

Attorneys for Defendant.

[Endorsed]: Filed Sept. 9, 1942. [181]

[Title of Court and Cause.]

DESIGNATION BY PLAINTIFF OF ADDITIONAL MATTERS TO BE INCLUDED IN RECORD ON APPEAL

Comes now Straight Side Basket Corporation, a corporation, appellee in the above entitled cause, and designates the following additional matters to be contained in the record on appeal:

1. Affidavit of Oliver O. Haga, filed January 27, 1942, in opposition to motion to dismiss.
2. Minutes of Court on hearing in above cause, had on February 2, 1942.
3. Order extending time for taking depositions.
4. Affidavit of Oliver O. Haga, filed April 6, 1942.
5. Order of Court dated April 15, 1942.
6. Minute entry of May 7, 1942, relative to defendant's motion to dismiss.
7. Amendment to plaintiff's amended complaint. This may be substituted for notice of such amendment included in appellant's designation.
8. Minute entry of Court relative to amendment to [182] amended complaint.

Dated September 21, 1942.

RICHARDS & HAGA

Attorneys for Straight Side  
Basket Corporation,  
Appellee  
Address: Boise, Idaho

(Affidavit of service attached.)

[Endorsed]: Filed Sept. 21, 1942. [183]

[Title of Court and Cause.]

MOTION FOR EXTENSION OF TIME FOR  
FILING RECORD ON APPEAL

Comes now the plaintiff by its attorneys, George Donart and Frederick P. Cranston, and moves that an extension of time to November 2, 1942 be granted for filing the record on appeal and docketing the action in the United States Circuit Court of Appeals for the 9th Circuit for the following reasons:

1. Under Rule 73(g) of the Rules of Civil Procedure, this record must be filed, and the action docketed in the said Circuit Court of Appeals on or before October 19, 1942.

2. All counsel in this case are persons not having a residence in San Francisco, and it is doubtful whether the said record can be withdrawn for the purpose of preparing designation of portions of the record to be printed.

3. Counsel for defendant and appellant are not residents of Boise, Idaho, and cannot inspect the record during the course of preparation; and Frederick P. Cranston, one of the counsel for defendant and appellee, expects to perform the major portion of the work in the preparation of said designation, and desires to have the record sent to him, and to prepare said designation before causing the record to be filed in San Francisco and the action docketed in said Circuit Court of Appeals; and in order to perform the said work accurately and



properly, feels that it can be done better if it is not required to be done hastily.

4. There has been no undue delay at any stage of this proceeding upon the part of defendant or appellant.

GEORGE DONART

Of Weiser, Idaho.

FREDERICK P. CRANSTON

of 409 Equitable Bldg.,

Denver, Colorado.

Attorneys for Defendant.

[Endorsed]: Filed Oct. 5, 1942. [184]

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[Title of Court and Cause.]

ORDER FOR EXTENSION OF TIME

Upon motion of defendant it is Ordered that the time for filing the record on appeal, and docketing the action in the United States Circuit Court of Appeals for the 9th Circuit is extended to November 2, 1942.

Dated Oct. 5th, 1942.

By the Court:

CHARLES C. CAVANAH

Judge

[Endorsed]: Filed Oct. 5, 1942. [185]

[Title of Court and Cause.]

SUPPLEMENTAL DESIGNATION OF CON-  
TENTS OF RECORD ON APPEAL

In addition to the portions of the record already designated, the defendant designates the following to be included in the record on appeal:

1. Motion for extension of time for filing record on appeal.
2. Order for extension of time of record on appeal.
3. Supplemental designation.

GEORGE DONART

of Weiser, Idaho.

FREDERICK P. CRANSTON

of 409 Equitable Bldg.,

Denver, Colorado.

Attorneys for defendant.

[Endorsed]: Filed Oct. 5, 1942. [186]

[Clerk's Certificate in Due Form.] [188]

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PLAINTIFF'S EXHIBIT No. 1

Sales Order

CUMMER-GRAHAM CO.

General Office Paris, Texas

Paris, Texas.....19.....

Gentlemen:

You may enter my order for the items indicated below, subject to the stipulations printed on the reverse side of this order.

To be shipped to.....

Destination.....

To be charged to.....

Address.....

To be shipped from.....

Shipping date .....

F. O. B.....Frts. allowed to.....

Terms.....

.....  
(Discount allowed only on net amount of invoice)

Price

.....  
Remarks:

.....  
Subject to confirmation by general office, Paris,  
Texas.

Signed.....

Sold By..... By.....

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PLAINTIFF'S EXHIBIT No. 2

CERTIFICATE OF RETAIL DEALER

I, the undersigned, certify that I am familiar with the foregoing excerpts from the Robinson-Patman Act, and with the obligations and liabilities of a retail dealer under this Act, and that, as a retail dealer in the sale of baskets, I will abide by the terms of said Act.

I further certify that I qualify as a retail dealer in the purchase and sale of baskets and fruit containers in that I buy for resale and am, therefore, entitled to a retail dealers discount from the manufacturer. I agree that such discount as I may receive in the purchase of baskets will be retained by me for services rendered during the calendar year of 1939.

Dated July 12, 1939.

C. H. KINNEY

Witness

F. H. HOGUE

Qualified Retail Dealer

Payette, Idaho

Approved by:

CUMMER-GRAHAM CO.

Manufacturer or Seller

H. W. NORTON, V.P.

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PLAINTIFF'S EXHIBIT No. 3

[Title of District Court and Cause.]

ORDER APPOINTING TRUSTEE

On reading and filing the petition of F. H. Hogue praying for the appointment of Scott Brubaker as Trustee of an expressed trust to succeed C. N. Kinney now deceased, and it appearing from said petition and original documents presented to the Court in support thereof that on February 14,

1941, F. H. Hogue and Florence G. Hogue executed two certain trust agreements as grantors in favor of C. N. Kinney as Trustee, wherein and whereby they conveyed to the said C. N. Kinney as such Trustee the real and personal property therein described for the uses and purposes therein set forth,

And it further appearing that the said C. N. Kinney is now deceased and that said trust agreements, and each of them, by their terms and provisions provide that a successor to the said C. N. Kinney may be appointed by any Judge of the above entitled Court and that for the reasons set forth in said petition it is necessary that a successor be appointed as Trustee under said trust agreements to succeed the said C. N. Kinney, deceased, and that Scott Brubaker of Payette, Idaho, is a fit, suitable and competent person to serve as such trustee as successor to the said C. N. Kinney.

Now, Therefore, By virtue of said petition and authority so vested in me by the terms and provisions of said trust agreements, it hereby Ordered that Scott Brubaker be and he is hereby appointed Trustee of the trust created in that certain trust agreement executed by F. H. Hogue and Florence G. Hogue dated February 14, 1941, by the terms of which certain real property therein described was by the said F. H. Hogue and Florence G. Hogue conveyed to the said C. N. Kinney, trustee;

And it is further Ordered that Scott Brubaker be and he is hereby appointed Trustee of the trust created in that certain trust agreement executed by

F. H. Hogue and Florence G. Hogue dated February 14, 1941, by the terms of which certain personal property therein described was by the said F. H. Hogue and Florence G. Hogue conveyed to the said C. N. Kinney, Trustee;

And it is further Ordered that the said Scott Brubaker be and he is hereby empowered to act and continue to act as said Trustee under said trust instruments, and each of them, and to exercise all the powers and duties therein and to be provided to be executed and performed by the said Trustee.

Dated this 14th day of January, 1942.

A. O. SUTTON

District Judge.

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#### PLAINTIFF'S EXHIBIT No. 4

#### TRUST AGREEMENT

Know All Men By These Presents: That we, F. H. Hogue and Florence G. Hogue, his wife, of the County of Payette, State of Idaho, hereinafter called the grantor, for and in consideration of the indebtedness herein mentioned, and in further consideration of One Dollar in hand paid to the grantor by C. N. Kinney, of the City of Denver, County of Denver, State of Colorado, hereinafter called the Trustee, the receipt whereof is hereby acknowledged, does hereby bargain, sell, convey, transfer, assign and set over unto said Trustee the following described real property situate in the

Counties of Payette, Gem and Valley, in the State of Idaho, to-wit:

Together with the tenements, hereditaments and appurtenances hereunto belonging or in anywise appertaining;

Also, all right, title and interest of F. H. Hogue in and to any lease owned by the said F. H. Hogue to the above described lands and premises and any leasehold interest owned by the said F. H. Hogue in and to the following described additional property situate in the County of Malheur, State of Oregon, and in the Counties of Payette, Gem and Valley, State of Idaho, to-wit:

To Have And To Hold The same and every part thereof unto the said Trustee, and the said grantor hereby consents and agrees to and with the said Trustee that at the date hereof the said grantor F. H. Hogue is lawfully possessed of said property.

But the condition of the said assignment, transfer and sale of the said property, goods and chattels is such, that whereas, the said F. H. Hogue is justly indebted to the certain persons hereinafter called creditors, whose names with their respective addresses and with the amount owing to each is shown in affidavit hereto attached and made a part hereof, in the total amount therein named.

Now, Therefore, this instrument is executed and delivered for the purpose of securing the payment of said indebtedness on or before one day after the date hereof.

Now, Therefore, If the said F. H. Hogue shall

well and truly and promptly pay the aforesaid indebtedness on or before one day from date hereof, then these presents to be null and void—otherwise to remain in full force and effect; but the Trustee may at his option in the meantime have immediate and full possession and custody of all of said property, and it is hereby agreed that if said indebtedness shall not be paid on or before one day from the date hereof, or if default shall be made in the keeping and performance of any one or more of the covenants, conditions or agreements aforesaid, or if at any time before said indebtedness shall be fully paid, the said property, goods and chattels, or any part thereof, shall be claimed, attached or taken, or be about to be claimed, attached or taken, by any person or persons, or if at any time hereafter, before said indebtedness shall be fully paid, the said trustee shall feel insecure or unsafe in this security, then, and in any such case, the said trustee may then or at any time thereafter whether said indebtedness shall have become due and payable or not, proceed to sell the said property, or any part thereof, at public or private sale, at such time or times, on such terms, for such price or prices, in such manner, and to such person or persons as the said trustee may see fit, and he may dispose of all property above described in any manner he deems best; he may compromise or extend time for payment of choses in action, judgments, accounts and notes receivable, or he may sell them at public or private sale, or he may continue the business of



trantor at retail as long as he deems it advisable for the best interests of the creditors of F. H. Hogue.

The Trustee shall exercise his best judgment in conducting the business, in selling the assets, in collecting the accounts receivable, and in converting said assets into money. He shall not be liable for any error in judgment, nor shall his acts in selling any of the assets or in collecting or compromising the bills receivable or in selling the assets subject him to any personal liability, Provided, he shall be liable and account for all money actually received by him. The money so obtained shall be deposited in a bank selected by the trustee. In case the bank in which the funds are deposited shall fail, the trustee shall not be personally liable therefor. Money on hand shall be applied to the payment of the following items in the order set forth below:

First: To pay for all expenses of trustee while conducting the business; including the merchandise purchased.

Second: To pay the expenses incidental to the negotiation, preparation and execution of this trust and for the carrying of the same into effect, including necessary attorney's fees and a reasonable compensation to said trustee for his services herein provided to be rendered, which fee shall be due and owing to trustee immediately upon acceptance of this trust.

Third: To pay any and all taxes against the

property so sold which at the time of said sale are a lien thereon, unless said property is sold subject to said taxes.

Fourth: To pay any indebtedness secured against the property sold which is senior to the indebtedness hereby secured, unless said property is sold subject to said encumbrance.

Fifth: To pay claims against F. H. Hogue of creditors listed in affidavit above described, which are wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months of the date of this instrument, not to exceed six hundred (\$600.00) dollars to any one person.

Sixth: The balance of funds remaining on hand after having been used for the aforesaid purposes shall be pro-rated among the other creditors of F. H. Hogue listed on said affidavit as their interests may appear, in such installments and at such times as the trustee shall think fit until all the claims of said creditors are paid in full.

Seventh: The balance of the funds remaining on hand after having been used for the aforesaid purpose shall be paid to F. H. Hogue.

The consent of every creditor named in affidavit aforesaid to this instrument is presumed and every creditor named in said affidavit shall be entitled to all benefits hereunder immediately upon delivery hereof. If any creditor shall dissent, the share to which said creditor would be entitled by the terms hereof shall be distributed pro rata to

such creditors named in affidavit aforesaid as shall consent hereto until the claims of said creditors shall be paid in full, and shall hereafter be paid to the said F. H. Hogue.

The trustee may require any creditor to file with him a sworn itemized statement showing indebtedness due from F. H. Hogue, together with any other instrument or instruments upon which the claim of said creditor shall be based. If any creditor shall object to the validity of the indebtedness claimed to be due to any other creditor, it shall file objections in writing with the trustee, and the trustee shall notify the creditor of the validity of whose claim objection has been made that said objections have been filed and shall notify said creditor that the validity of the indebtedness due from F. H. Hogue must be established in a court of competent jurisdiction and that an action for that purpose must be commenced in such a court within sixty (60) days from the date of giving said notice. In the event that such action is not commenced within said time limited, the share due to said creditor shall be distributed by the trustee in the same manner as above provided for the distribution of the share of a dissenting creditor.

I, in pursuance of the terms hereof, the said trustee shall exercise the option of holding the said indebtedness due on account of any default herein aforesaid, it shall not be necessary that such option shall be communicated to the said F. H. Hogue, but said trustee may proceed to take possession of and sell said property, as above herein provided.

F. H. Hogue nominates and appoints the trustee as his attorney-in-fact to do and perform all acts and to execute and deliver all instruments in the name of F. H. Hogue which shall be necessary or convenient for the accomplishment of the trust herein reposed to the same effect as if said acts had been done or performed or said instruments had been executed and delivered by F. H. Hogue.

In case of the death, resignation, or subsequent legal incapacity of the trustee, the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette, or either of the Judges thereof, may upon application of any person interested herein, appoint a successor in trust of said trustee and upon acceptance of this trust, the trustee so appointed shall succeed to all rights and powers formerly possessed by his predecessor in trust and shall be subject to all liabilities to which said predecessor in trust was formerly liable.

This transfer is made subject to all liens and encumbrances now outstanding against the above described land.

This transfer is made also subject to the following terms and conditions, to-wit: Any creditor who signifies his assent to and acceptance of the terms and provisions of this agreement or consents to the acceptance of his portion of benefits thereunder shall be conclusively presumed to have released the said F. H. Hogue of all claims and demands of every kind and nature due and owing from the

said F. H. Hogue to such creditor, and such acceptance and/or participation in benefits shall constitute a complete release of said F. H. Hogue from all liability to said person, persons, firms or corporations who accept the terms and provisions of this instrument or any benefits hereunder.

In Witness Whereof, the grantor has caused their names to be subscribed this 14th day of February, 1941.

F. H. HOGUE

FLORENCE G. HOGUE

Grantor.

In Witness Whereof, the trustee subscribes his name and by so doing accepts this trust this 14th day of February, 1941.

C. N. KINNEY

Trustee.

State of Idaho,  
County of Payette—ss.

On this 14th day of February, 1941, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared F. H. Hogue and Florence G. Hogue, his wife, and C. N. Kinney, known to me to be the persons whose names are subscribed to the foregoing and above instrument and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]                    SCOTT BRUBAKER,  
Notary Public, Residing at Payette, Idaho.  
My commission expires April 5, 1944.

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PLAINTIFF'S EXHIBIT No. 5

Exhibit 5 is uniform bill of lading dated August 20, 1941, showing shipment of Vegetable Hampers from Dayton Veneer & Lumber Mills of Americus, Georgia, consigned to Cummer-Graham Co., Nampa, Idaho.

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PLAINTIFF'S EXHIBIT No. 6

Exhibit 6 is invoice of Cummer-Graham Company, Paris, Texas, dated September 12, 1940, showing sale of baskets to itself, care J. C. Palumbo Fruit Co., Payette, Idaho, in amount of \$500.74, and letter of J. C. Palumbo Fruit Co. to Cummer-Graham Co. dated September 23, 1940, enclosing check for \$500.74 in payment for same, and another invoice dated September 5, 1940, from Cummer-Graham Co., Nineola, Texas, to itself at Nampa, Idaho, for baskets and a bill of lading covering same shipment, and a letter which should be printed.

## PLAINTIFF'S EXHIBITS Nos. 7 and 8

Exhibits 7 and 8 are reports of shipments for July, August and September 1939; June and August 1940; June, August and September, October and March 1941 respectively made by Cummer-Graham Company to Straight Side Basket corporation showing 486 cars of shipments of different types of baskets. The reports list various shipments into several states of which there are shipments of only 196 cars to Idaho which were made to the following persons: To R. Atkinson Co. at following Idaho points: Allendale, Payette, Caldwell, Maising, Nampa, Meridian, Boise, Emmet, Plaza, Fruitland, Filer, Parma, Council, Homedale; to F. C. Hogue at following Idaho points: Payette, Mesa, Nampa, Emmett, Draggs, Fruitland; to F. C. Marquardson at Buhl, Idaho; to Harry Heller at Twin Falls and Filer; to H. C. Spinner at following Idaho points: Nampa, Free-water, Emmett and Homedale; and to B. G. Batt at Wilder, Idaho; and Symms Fruit Ranch, Maising and Huston, Idaho. These exhibits show one car consigned to Cummer-Graham Co. at New Plymouth, Idaho. Attached to Exhibit 8 is check as follows:

Cummer-Graham Company  
 General Offices  
 Paris, Texas

“It Pays to Pack in Wood”

Statement Accompanying Check No. 40863

Your Reference	Explanation
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Our Acct. Number 2701	
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Invoice Amount 90.47	
----------------------	--

Less Discount	Net Amount
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Report of Sales for the month of March, 1941.

Cummer-Graham Co. C S Tubs, 23.50 net.

Cummer-Graham Co. & Veneer Prod. Co. SIB  
 Tubs, 66.97.

Detach before depositing. The attached check is tendered in full payment of the account as shown above. Endorsement of this check constitutes our full receipt. If not correct please return both check and statement.

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#### PLAINTIFF'S EXHIBIT No. 9

Exhibit 9 is similar record of report of F. E. Prince Co. of Pittsburgh, Texas showing 31 shipments of which 10 are to following persons in Idaho: Reilly Atkinson Co. at Nampa; Cherry Valley Wholesale Co. at Fernland; So. Idaho Fruit Co. at Nampa; Chaney Wholesale Co. at Nampa. Attached to this are letters as follows:



F. E. PRINCE CO.  
Manufacturers of  
Fruit and Vegetable Packages  
Pittsburg, Texas  
Est. 1903

Sweet Potato Crates, Vegetable Crates,  
Berry Crates

Continuous Stave Tubs, Round Bottom  
Baskets, Four Hoop Hampers

November 13, 1941

St. Side Basket Corp.,  
Benton Harbor, Mich.

Gentlemen:

Referring to your letter of November 5th regarding our October Report.

Referring to lines 12 and 13 on our October report showing two cars shipped to Reilly-Atkinson Co., this should have shown Cummer-Graham Co. as we invoiced Cummer-Graham Co., and we will not realize the gross amount from these two cars that is shown on the report. Therefore, 3½c per dozen on the 900 dozen shown, \$31.50, is correct. Please change your records accordingly.

[Pencil notation]: Changed O.K. S.

Yours very truly,

F. E. PRINCE CO.,

A. V. KINNEY,

AVK/r

Mgr.

Quotations for prompt acceptance. All agreements contingent upon strikes, accidents, transportation delays and for causes beyond our control.

November 5, 1941  
F. E. Prince Company  
Pittsburg, Texas

Gentlemen:

We acknowledge your September and October reports showing a total owing us of \$632.13.

Your October report, lines 12 and 13, show sales amounting to \$1,809.00 with a star reference prefixing an amount of \$31.50. Will you please advise why this royalty amount should not show \$45.23—this is a shortage of \$13.73 for which we are debiting your account.

Yours very truly,

STRAIGHT SIDE BASKET  
CORP.

By E. E. BIRKETT

EEB:EP

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PLAINTIFF'S EXHIBIT No. 10

[Title of District Court and Cause.]

PETITION FOR APPOINTMENT OF  
SUCCESSOR

To the Honorable A. O. Sutton, one of the Judges  
of the District Court of the Seventh Judicial  
District of the State of Idaho, in and for the  
County of Payette:

The petition of F. H. Hogue respectfully shows:

I.

That on or about February 14, 1941, the said  
F. H. Hogue and Florence G. Hogue, his wife, of

the County of Payette, State of Idaho, as grantors, executed in favor of C. N. Kinney of the City and County of Denver, State of Colorado, as grantee, two certain instruments hereinafter referred to as a trust agreement, wherein and whereby they conveyed to the said C. N. Kinney as Trustee for the uses and purposes therein stated, certain real and personal property belonging to the grantors and situate in the Counties of Payette, Gem and Valley, in the State of Idaho, and in the County of Malheur, State of Oregon;

## II.

That pursuant to the terms contained in said trust agreement they conveyed said property to the said C. N. Kinney as such Trustee and the said C. N. Kinney of even date therewith executed a trust agreement by the terms and provisions of which he promised and agreed to hold said property in trust for the uses and purposes set forth in said trust agreement, notwithstanding the unconditional language contained in said deeds of conveyance.

## III.

That said trust agreement and declaration of trust is presented herewith to the Court for consideration and examination;

## IV.

That the said C. N. Kinney died in Denver, Colorado, on the 29th day of December, 1941, and by reason thereof, there is a vacancy in the office of

Trustee so created by the terms and provisions of said trust agreement; that said trust agreement contains the following clause, to-wit:

“In the case of the death, resignation, or subsequent legal incapacity of the trustee, the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette, or either of the Judges thereof, may upon application of any person interested herein, appoint a successor in trust of said trustee and upon acceptance of this trust, the trustee so appointed shall succeed to all rights and powers formerly possessed by his predecessor in trust and shall be subject to all liabilities to which said predecessor in trust was formerly liable.”

#### V.

That the said F. H. Hogue is one of the persons beneficially interested in said trust agreement and as such by the terms thereof has the power of nominating and requesting the appointment of a Trustee as successor to the said C. N. Kinney;

#### VI.

That the said petitioner, F. H. Hogue, hereby nominates and requests the appointment of Scott Brubaker of Payette, Idaho, as Trustee of said trust agreement to succeed the said C. N. Kinney, deceased, as provided for by the terms and provisions of said trust agreement;

## VII.

That the said Scott Brubaker is a resident of Payette County, Idaho, and is more familiar than any other person with the assets of said trust estate and with the accounts and previous actions of said C. N. Kinney, now deceased, by reason of the fact that the said Scott Brubaker worked for several weeks with the said C. N. Kinney and furnished him with much of the data upon which his report and account as Trustee was based and kept;

## VIII.

That C. H. Kinney, representative of J. A. McGill, and E. H. Murphy, Manager of First Security Bank of Payette, two of the principal beneficiaries under said trust, hereby join in the petition of the said F. H. Hogue and request that said petition be granted;

Wherefore, Your petitioner prays that an order of the above entitled Court be made appointing Scott Brubaker as Trustee of said trust to succeed the said C. N. Kinney, deceased, and such other and further order be made as is meet and proper in the premises.

F. H. HOGUE  
Petitioner.

State of Idaho

County of Washington—ss.

F. H. Hogue, being first duly sworn, deposes and says:

That he is the petitioner above named; that he has read the above and foregoing petition, knows the contents thereof and believes the facts therein stated to be true.

F. H. HOGUE

Subscribed and sworn to before me this 13th day of January, 1942.

[Geo. Donart Notarial Seal.]

GEO. DONART

Notary Public, residing at Weiser, Idaho.

My commission expires: 3/18/44.

We, the undersigned, hereby join in the above petition and request the appointment of Scott Brubaker as prayed therein.

Dated this 13th day of January, 1942.

J. A. McGILL,

By C. H. KINNEY

Agent.

FIRST SECURITY BANK OF  
IDAHO

By E. H. MURPHY

Manager

[Endorsed]: Filed Jan. 14, 1942.

State of Idaho

County of Payette—ss.

I, Lillian Wilson, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Payette, do hereby certify that the foregoing copy of Petition for Appointment of Successor in the case of “In the Matter of the Trust Agreement between F. H. Hogue and Florence G. Hogue, grantors, and C. N. Kinney, Trustee,” has been by me compared with the original and that it is a true and correct copy thereof, and of the whole of such original as the same appears on file at my office, and in my custody in Case No. 2107.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 23rd day of March, 1942.

[Seal]

LILLIAN WILSON

Clerk of the District Court

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PLAINTIFF'S EXHIBIT No. 11

Instrument No. 43951

This Indenture, Made the 10th day of February, in the year of our Lord one thousand nine hundred and thirty-nine, between F. H. Hogue and Florence G. Hogue, his wife, of Payette, County of Payette, State of Idaho, the party of the first part, and J. A. McGill of Paris, County of -----, State of Texas, the party of the second part:

Witnesseth, That the said parties of the first part,

for and in consideration of the sum of Thirty-three thousand, six hundred ninety-four and no/100 Dollars, lawful money of the United States, do by these presents Grant, Bargain, Sell and Convey, unto the said party of the second part, and to his heirs and assigns, Forever, all that certain real property situate in the County of Payette and State of Idaho and bounded and particularly described as follows, to-wit:

A part of the SE<sup>1</sup>/<sub>4</sub> of the SE<sup>1</sup>/<sub>4</sub> of Section 22, Township 8 North, Range 5 West of the Boise Meridian, particularly described as follows, to-wit: Beginning at a point located 518 feet West and 25 feet North of the SE corner of said Section 22 and running thence West 150 feet; thence North 230 feet; thence East 83 feet, more or less, to the Westerly side line of right of way of the Payette Valley Branch of the Oregon Short Line Railroad; thence in a southerly direction along said right of way to the place of beginning.

The North Half of the Northeast Quarter of the Southwest Quarter and the North Half of the South Half of the Northeast Quarter of the Southwest Quarter of Section Twenty-seven, Township Eight North of Range Five West of the Boise Meridian, except: Beginning at the Southeast corner of the North 30 acres of the Northeast Quarter of the Southwest Quarter of Section 27, Township 8 North of Range 5 West of the Boise Meridian; thence West 242



feet to a waste ditch; thence in a Northeast-erly direction along said waste ditch 250 feet; thence East 60 feet to the center of the road; thence South 176 feet to the place of beginning. Together with 30 shares of the capital stock of Farmers Co-Operative Irrigation Company Limited.

The West half of the South half of South west quarter of the Northwest quarter and the North half of the Southwest quarter of the Northwest quarter of Section one Township Six North of Range Two West B.M. (Situate in the County of Gem, State of Idaho.)

Lots 7, 8, 9 and 10 of Block 3, and the North 24.5 feet of Lot 1, and the South 23.5 feet of Lot 2, and all of Lot 3 in Block 2, all in Masters Addition to Payette, Idaho, according to the plat thereof filed January 10, 1887, and all being in lot 2 of Sec. 33, Twp. 9 N. R. 5 West of Boise Meridian; also, Block 1, 2, 3, 4 and 7 of Recorder's First Addition to Payette, Idaho; also, Block 5 of said Recorder's First Addition, except the following, to-wit: Beginning at a point 24.5 feet South of the Northeast corner of said Block 5, thence West 25 feet; thence South 12 feet; thence East 25 feet; thence North 12 feet to the place of beginning; also Block 6 of said Recorder's First Addition, except the following, to-wit: Beginning at a point 24.5 feet South of the Northeast corner of said Block 6; thence West to the right-of-way of the

Oregon Short Line Railroad; thence South 24 degrees 20 minutes West along said right-of-way 39 feet to the Southwest corner of said Block 6; thence East 40 feet; thence North 23.5 feet; thence East to the East side line of said Block 6; thence North 12 feet to the place of beginning; Also, Beginning at the Northeast corner of Block 4 of Recorder's First Addition to Payette, Idaho, thence East 75 feet, thence South 50 feet, thence West 75 feet, thence North 50 feet to the place of beginning; also, beginning at the Southeast corner of Block 4 of Recorder's First Addition to Payette, Idaho, thence East 75 feet, thence North 50 feet, thence West 75 feet, thence South 50 feet to the place of beginning.

And also the following described lands and premises situate in the County of Gem, State of Idaho:

The Northeast Quarter ( $NE\frac{1}{4}$ ) of the Southwest Quarter ( $SW\frac{1}{4}$ ) and the Northwest Quarter ( $NW\frac{1}{4}$ ) of the Southeast Quarter ( $SE\frac{1}{4}$ ) of Section three (3), Township Six (6) North, Range Two (2) West, B.M., also

Commencing at the quarter corner between sections three (3) and four (4), Township Six (6) North, Range Two (2) West of the Boise Meridian; running thence Easterly along the center line of said section three (3), following the center of the public highway a distance of two thousand three hundred twenty-seven (2327)

feet, more or less, to a point; thence Northerly twenty-five (25) feet to the North line of said highway to a point, which point is the real place of beginning; thence Easterly along the North line of said highway a distance of five hundred ninety-seven and seventy-two hundredths (597.72) feet to a point on the bank of a small lateral; thence North forty-eight (48) degrees forty-nine (49) minutes West a distance of five hundred ninety-five (595) feet, parallel to and on the Southwesterly side of said lateral to a point at the intersection with a second lateral running Southwesterly; thence South twenty (20) degrees fifty-eight (58) minutes West a distance of four hundred nineteen (419) feet, parallel to and on the Easterly side of said second lateral to the real place of beginning, and containing two and seven-tenths (2.7) acres, more or less; and commonly called the "Pierce Orchard."

There is also mortgaged all fixtures, machinery and equipment now kept and being in any dryers or dehydrating plants situate on any part of the above described premises, and all fixtures, machinery and equipment hereafter acquired and installed thereon during the life of this mortgage, which fixtures, machinery and equipment the mortgagors hereby covenant and agree are affixed to and shall be conclusively presumed to constitute a part of the real property hereinabove described.

together with the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining.

This Grant is intended as a Mortgage to secure the payment of one certain promissory note of even date herewith, executed and delivered by the said F. H. Hogue to the said party of the second part, true copy of which said promissory note is in the words and figures following, to-wit:

### PROMISSORY NOTE

\$33,694.00          Payette, Idaho, February 10, 1939

For Value Received, I promise to pay to the order of J. A. McGill at Paris, Texas, the sum of Thirty-three thousand, Six hundred ninety-four and no/100 (\$33,694.00) Dollars in lawful money of the United States of America, with interest thereon or on so much thereof as may from time to time remain unpaid, at the rate of 6% per annum payable annually from date. The principle sum of this note is payable in installments in the amount and at the times hereinafter specified, to-wit:

\$5,000.00 on or before November 1, 1939

\$5,000.00 on or before December 15, 1939

\$3,423.00 on or before January 15, 1940

\$3,424.00 on or before March 1, 1940

\$5,000.00 on or before November 1, 1940

\$5,000.00 on or before December 15, 1940

\$3,323.00 on or before January 15, 1941

\$3,324.00 on or before March 1, 1941

\$ 200.00 on or before March 1, 1942

If any installment of either principal or interest shall not be paid at the time the same becomes due as hereinbefore specified, then the holder of this note may, at his option, declare the entire unpaid balance of principal and interest immediately due and payable without notice to the maker of this note, and may institute all necessary and proper actions for the collection thereof.

In case suit or action is instituted to collect this note, or any part thereof, I promise to pay, besides the costs and disbursements allowed by law such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

F. H. HOGUE

And These Presents Shall Be Void if such payment be made. But in case default shall be made in the payment of said principal sums of money, or any part thereof as provided in the said note, or if the interest be not paid as therein specified, then it shall be optional with the said party of the second part, his executors, administrators or assigns, to consider the whole of said principal sums expressed in said note, as immediately due and payable, and immediately to enter into and upon all and singular the above described premises, and to sell and dispose of the same according to law, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of foreclosure suit, including a reasonable sum to be fixed by the court as counsel fees and

also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said second party, his heirs, executors, or assigns, with interest on the same, rendering the over-plus of the purchase money (if any there shall be) unto the said parties of the first part their heirs, administrators, executors or assigns.

In Witness Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the Presence of

F. H. HOGUE (Seal)

FLORENCE G. HOGUE (Seal)

(Seal)

(Seal)

State of Idaho

County of Payette—ss.

On this 15th day of February in the year 1939, before me, the undersigned, a Notary Public in and for said County, personally appeared F. H. Hogue and Florence G. Hogue, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

SCOTT BRUBAKER

Notary Public.

[Scott Brubaker Notarial Seal]

My Commission expires May 5, 1940.

State of Idaho

County of Payette—ss.

I hereby certify that this instrument was filed for record at the request of Jack Hogue at 45 minutes past 10 o'clock A.M., this 15 day of March, 1939 in my office, and duly recorded in Book 13 of Mortgages at page 575.

LILLIAN WILSON

Ex-Officio Recorder

By LOIS BOOMER

Deputy

Fees, \$3.40

State of Idaho

County of Payette—ss.

I, Lillian Wilson, Ex-Officio Recorder of Payette County, State of Idaho, do hereby certify that the foregoing copy of Mortgage has been by me compared with the recorded copy of the original Mortgage and that it is a true copy thereof, and of the whole of such recorded copy of the original as the same appears of record at my office, and in my custody in Book 13 of Mortgages at page 575.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 23rd day of March, 1942.

[Seal]

LILLIAN WILSON

Ex-Officio Recorder.

[Endorsed]: No. 10279. United States Circuit Court of Appeals for the Ninth Circuit. Cummer-Graham Company, a corporation, Appellant, vs. Straight Side Basket Corporation, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed October 9, 1942.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
of the Ninth Circuit  
No. 10279

CUMMER-GRAHAM COMPANY,  
a Corporation, Appellant,  
vs.  
STRAIGHT SIDE BASKET CORPORATION,  
Appellee.

ADOPTION OF STATEMENT OF POINTS  
RELIED ON

The Appellant adopts the Statement of Points Relied on filed in the District Court as its Statement of Points Relied on in this Court.

GEORGE DONART  
of Weiser, Idaho.

FREDERICK P. CRANSTON  
of 409 Equitable Bldg., Den-  
ver, Colorado.  
Attorneys for Appellant.



I certify that I have served a copy of the within Adoption of Statement of Points Relied On upon Richards & Haga, Attorneys for Appellee, by depositing in the Post Office at Denver, Colorado, with postage thereon prepaid, a copy of said Adoption of Statement of Points Relied On addressed to Richards & Haga at their address at Boise, Idaho on October 22, 1942.

FREDERICK P. CRANSTON,  
One of the Attorneys for  
Appellant.

[Endorsed]: Filed Oct. 26, 1942.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTION OF RECORD  
TO BE PRINTED

Cummer-Graham Company designates the following portions of the record and proceedings to be printed:

1. Complaint.
2. Summons and Return on Service of Writ.
3. Motion to Dismiss.
4. Affidavit of C. H. Kinney.
5. Affidavit in Opposition to Motion to Dismiss.
6. Counter Affidavit in Support of Motion to Dismiss.
7. Minutes of Court of February 2, 1942.
8. Amended Complaint.
9. Affidavit of Oliver O. Haga.

10. Opinion of April 15, 1942.
11. Order of April 15, 1942.
12. Order of May 7, 1942.
13. Answer to Amended Complaint.
14. Motion for Summary Judgment under Rule 56.
15. Amendments to Amended Complaint and Order.
16. Order Allowing same to be made.
17. Adoption of Motion and Answer.
18. Summary Judgment.
19. Depositions of C. H. Kinney, A. V. Kinney and A. C. Mackin.
20. Notice of Appeal.
21. Notation that Undertaking on Appeal for \$250.00 filed September 9, 1942.
22. Statement of Points Relied On.
23. Designation of Contents of Record on Appeal.
24. Designation by plaintiff of Additional Matters to be Included in Record on Appeal.
25. Motion for Extension of Time for Filing Record on Appeal.
26. Order for Extension of Time.
27. Supplemental Designation of Contents of Record on Appeal.
28. Print following notation—"Clerk's Certificate in due form."
29. Print Depositions of Frederick C. Hogue, Scott Brubaker, J. C. Palumbo and R. H. DeHaven up to Reporter's Certificate on p. K-82, and then

a. Print following notation—"Reporter's Certificate in due form."

b. Print following notation—"Notary's Certificate in due form."

c. Print Exhibit 1.

d. Print portion of Exhibit 2 beginning with paragraph commencing "We the undersigned" and continuing to end of Exhibit.

e. Print Exhibit 3.

f. Print Exhibit 4.

g. Print following notation—"Exhibit 15 is uniform bill of lading dated August 20, 1941, showing shipment of Vegetable Hampers from Dayton Veneer & Lumber Mills of Americus, Georgia, consigned to Cummer-Graham Co., Nampa, Idaho."

h. Print following notation—"Exhibit 6 is invoice of Cummer-Graham Company, Paris, Texas dated September 12, 1940 showing sale of baskets to itself, Care J. C. Palumbo Fruit Co., Payette, Idaho, in amount of \$500.74, and letter of J. C. Palumbo Fruit Co. to Cummer-Graham Co. dated September 23, 1940 enclosing check for \$500.74 in payment for same, and another invoice dated September 5, 1940 from Cummer-Graham Co., Nineola, Texas, to itself at Nampa, Idaho, for baskets and a bill of lading covering same shipment, and a letter which should be printed."

i. Print following notation—"Exhibits 7 and 8 are reports of shipments for July, August and September 1939; June and August 1940; June, August and September, October and March 1941 respec-

tively made by Cummer-Graham Company to Straight Side Basket corporation showing 486 cars of shipments of different types of baskets. The reports list various shipments into several states of which there are shipments of only 196 cars to Idaho which were made to the following persons: To R. Atkinson Co. at following Idaho points: Allendale, Payette, Caldwell, Maising, Nampa, Meridian, Boise, Emmet, Plaza, Fruitland, Filer, Parma, Council, Homedale; to F. C. Hogue at following Idaho points: Payette, Mesa, Nampa, Emmett, Driggs, Fruitland; to F. C. Marquardson at Buhl, Idaho; to Harry Heller at Twin Falls and Filer; to H. C. Spinner at following Idaho points: Nampa, Freewater, Emmett and Homedale; and to B. G. Batt at Wilder, Idaho; and Symms Fruit Ranch, Maising and Huston, Idaho. These exhibits show one car consigned to Cummer-Graham Co. at New Plymouth, Idaho. Attached to Exhibit 8 is check as follows—"Copy check attached to Exhibit 8 in full."

j. Print following notation—"Exhibit 9 is similar record of report of F. E. Prince Co. of Pittsburgh, Texas showing 31 shipments of which 10 are to following persons in Idaho: Reilly Atkinson Co. at Nampa; Cherry Valley Wholesale Co. at Fernland; So. Idaho Fruit Co. at Nampa; Chaney Wholesale Co. at Nampa." Attached to this are letters as follows—Print letters attached to Exhibit 7.

k. Print Exhibit 10.

1. Print Exhibit 11.
30. Adoption of Statement of Points Relied On.
31. This designation.

GEORGE DONART

of Weiser, Idaho.

FREDERICK P. CRANSTON

of 409 Equitable Bldg., Den-  
ver, Colo.,

Attorneys for Appellant.

I certify that I have served a copy of the within designation upon Richards & Haga, Attorneys for Appellee, by depositing in the Post Office at Denver, Colorado, with postage thereon prepaid, a copy of said Designation addressed to Richards & Haga at their address at Boise, Idaho on October 22, 1942.

FREDERICK P. CRANSTON

One of the Attorneys for  
Appellant.

[Endorsed]: Filed Oct. 26, 1942.

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[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDI-  
TIONAL PARTS OF RECORD TO BE  
PRINTED

Straight Side Basket Corporation, Appellee on the above appeal, is in doubt as to the identity of certain documents referred to in the Designation

made by appellant of portions of record to be printed because there were several matters designated which required the date of the affidavit or the orders or minutes for proper identification. Appellee does not desire that any document or instrument should be printed more than once in the record, but in view of the uncertainty as to what documents are covered by appellant's Designation appellee especially requests that the following documents or matters be included in the printed record:

1. Affidavit of Oliver O. Haga, filed January 27, 1942.
2. Affidavit of Oliver O. Haga filed April 6, 1942.
3. Minute entry in court record of May 7, 1942.
4. Minute entry of court relative to amendment to amended complaint made on or about August 11, 1942.
5. Deposition of F. H. Hogue.
6. Following the notation requested by appellant in its Designation No. 29B after the words "Notary's Certificate in due form" insert the following:

The Notary's Certificate, among other things, contains the following statement:

"That on Friday, March 27, 1942, not having received the contract or contracts between defendant and Frederick C. Hogue supposed to be supplied by the latter, I 'phoned said Frederick C. Hogue about 4:55 P.M. of said day and asked him about the matter;

That said Frederick C. Hogue then stated to me that he was still unable to locate his con-

tract with Cummer-Graham Company, or any one of such contracts; that he had made a thorough search of his files and records, and was positive he does not have such contract or contracts in his possession.”

In view of the fact that the exhibits referred to in appellant's designation have been sent by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals, appellee has had no opportunity to check the synopsis of such exhibits which appellant requests be printed and appellee is accordingly unable to determine whether there are other parts of such exhibits material to appellee's case on appeal. Appellee, therefore, reserves the right to refer in its brief and on the oral argument to anything contained in the exhibits and record material to its appeal, even though not included in the printed record, and to have such parts printed, if required by the court, in a supplemental record, at appellant's expense.

OLIVER O. HAGA

J. L. EBERLE

RICHARDS & HAGA

Attorneys for Appellee Straight  
Side Basket Corporation

Residence: Boise, Idaho

I hereby certify that on October 28, 1942, I served a copy of the within Designation upon George Donart, Esq., whose post office address is Weiser, Idaho, and one copy thereof on Frederick P. Crans-

ton, Esq., whose post office address is 409 Equitable Building, Denver, Colorado, attorneys for appellant, by depositing in the post office at Boise, Idaho, said copies enclosed in an envelope addressed to the said attorneys for appellant, with the necessary postage thereon prepaid.

OLIVER O. HAGA

[Endorsed]: Filed Nov. 2, 1942.